

4-12-2013

State v. Hunter Clerk's Record v. 1 Dckt. 40950

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

MARK C. HUNTER,

Defendant-Appellant.

Supreme Court Case No. 40950

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE KATHRYN A. STICKLEN

ADA COUNTY PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

State of Idaho vs. Mark Christopher Hunter

Date	Code	User		Judge
4/18/2011	NCRM	TCMCCOSL	New Case Filed - Misdemeanor [Citation issued 04/16/2011]	Magistrate Court Clerk
	PROS	TCMCCOSL	Prosecutor assigned Boise City Prosecutor- Generic	Magistrate Court Clerk
4/22/2011	BNDS	TCMCCOSL	Bond Posted - Surety (Amount 1000.00)	Magistrate Court Clerk
	BCON	TCMCCOSL	Condition of Bond: Jail Reference Booking: 100486902 Jail Reference Stay: 1	Magistrate Court Clerk
5/6/2011	AFPD	TCCAMPAM	Application For Public Defender	Magistrate Court Clerk
	HRSC	TCCAMPAM	Hearing Scheduled (BC Pretrial Conference 06/27/2011 03:15 PM)	Kevin Swain
	HRSC	TCCAMPAM	Hearing Scheduled (Jury Trial 07/22/2011 08:15 AM)	Kevin Swain
		TCCAMPAM	Notice of Hearing [file stamped 05/09/2011]	Magistrate Court Clerk
	ORPD	TCCAMPAM	Order Appointing Public Defender [file stamped 05/09/2011]	Magistrate Court Clerk
	CHGA	TCCAMPAM	Judge Change: Adminisitrative	Kevin Swain
5/12/2011	RQDD	TCFARANM	Defendant's Request for Discovery	Kevin Swain
5/17/2011	RSDS	TCBROXLV	State/City Response to Discovery	Kevin Swain
	RQDS	TCBROXLV	State/City Request for Discovery	Kevin Swain
6/27/2011	PTMM	TCEMERYV	Pretrial Memorandum	Kevin Swain
	CONH	TCEMERYV	Hearing result for BC Pretrial Conference scheduled on 06/27/2011 03:15 PM: Conference Held	Kevin Swain
7/22/2011	TSMH	TCEMERYV	Trial Status Memo	Kevin Swain
	CONH	TCEMERYV	Hearing result for BC Pretrial Conference scheduled on 07/22/2011 08:15 AM: Conference Held	Kevin Swain
	HRSC	TCEMERYV	Hearing Scheduled (Jury Trial 08/10/2011 08:15 AM)	Kevin Swain
		TCEMERYV	Notice of Hearing [file stamped 07/25/2011]	Kevin Swain
7/27/2011	RSDS	TCOLSOMC	State/City Response to Discovery / Supplemental	Kevin Swain
7/29/2011	RSDS	TCLANGAJ	State/City Response to Discovery/Supplemental	Kevin Swain
8/2/2011	RSDS	TCLANGAJ	State/City Response to Discovery/Supplemental	Kevin Swain
8/10/2011	PTMM	TCEMERYV	Pretrial Memorandum	Kevin Swain
	HRVC	TCEMERYV	Hearing result for Jury Trial scheduled on 08/10/2011 08:15 AM: Hearing Vacated	Kevin Swain
	HRSC	TCEMERYV	Hearing Scheduled (Jury Trial 10/12/2011 08:15 AM)	Kevin Swain
		TCTOLLML	Notice of Hearing	Kevin Swain
10/5/2011	MOTN	TCTONGES	Motion to Vacate Jury Trial, Enlarge Time and Set Hearing on Suppression Issue	Kevin Swain

State of Idaho vs. Mark Christopher Hunter

Date	Code	User		Judge
10/7/2011	OBJE	TCTONGES	Objection to Motion to Suppress	Kevin Swain
10/12/2011	HRVC	TCEMERYV	Hearing result for Jury Trial scheduled on 10/12/2011 08:15 AM: Hearing Vacated	Kevin Swain
	HRSC	TCEMERYV	Hearing Scheduled (Motion to Suppress 11/07/2011 03:30 PM)	Kevin Swain
		TCEMERYV	Notice of Hearing	Kevin Swain
10/17/2011	BAAT	TCNELSRA	ATTORNEY REASSIGNED BY BATCH PROCESSING (batch process) Erik J O'Daniel, 6534 removed. PD SWAIN #4 assigned.	
	BAAT	TCNELSRA	ATTORNEY REASSIGNED BY BATCH PROCESSING (batch process) PD SWAIN #4 removed. Daniel M Truscott, 5338 assigned.	
10/31/2011	MEMO	TCTONGES	Memorandum in Support of Motion to Suppress Evidence	Kevin Swain
11/7/2011	MEMO	TCTONGES	State's Response to Defendant's Memorandum in Support of Motion to Suppress Evidence	Kevin Swain
	CONH	TCEMERYV	Hearing result for Motion to Suppress scheduled on 11/07/2011 03:30 PM: Conference Held	Kevin Swain
	HRSC	TCEMERYV	Hearing Scheduled (Hearing Scheduled 12/07/2011 09:30 AM) Decision from Suppression to enter	Kevin Swain
		TCEMERYV	Notice of Hearing	Kevin Swain
12/6/2011	ORDR	TCWEGEKE	Decision and Order	Kevin Swain
12/7/2011	GRNT	TCEMERYV	Motion to Suppress Granted	Kevin Swain
	PTMM	TCEMERYV	Pretrial Memorandum	Kevin Swain
	CONH	TCEMERYV	Hearing result for Hearing Scheduled scheduled on 12/07/2011 09:30 AM: Conference Held Decision from Suppression to enter	Kevin Swain
	HRSC	TCEMERYV	Hearing Scheduled (BC Pretrial Conference 12/16/2011 08:15 AM)	Kevin Swain
		TCEMERYV	Notice of Hearing	Kevin Swain
12/12/2011	MOTN	TCTONGES	Motion for Permission for Interlocutory Appeal	Kevin Swain
12/16/2011	ORDR	TCEMERYV	Order Granting Permission for Interlocutory Appeal	Kevin Swain
	CONH	TCEMERYV	Hearing result for BC Pretrial Conference scheduled on 12/16/2011 08:15 AM: Conference Held	Kevin Swain
	HRSC	TCEMERYV	Hearing Scheduled (Hearing Scheduled 03/05/2012 09:30 AM)	Kevin Swain
		TCEMERYV	Notice of Hearing [file stamped 01/11/2012]	Kevin Swain
1/5/2012	MOTN	DCLYKEMA	Motion for Permission for Interlocutory Appeal	Kathryn A. Sticklen
1/9/2012	APDC	TCOLSOMC	Appeal Filed In District Court	Kevin Swain
	CAAP	TCOLSOMC	Case Appealed:	Kevin Swain

State of Idaho vs. Mark Christopher Hunter

Date	Code	User	Judge
1/9/2012	CHGA	TCOLSOMC	Judge Change: Administrative
1/19/2012	ORDR	DCLYKEMA	Order Granting Permission for Interlocutory Appeal [file stamped 01/18/2012]
3/5/2012	CONH	TCEMERYV	Hearing result for Hearing Scheduled scheduled on 03/05/2012 09:30 AM: Conference Held
	CONT	TCEMERYV	Hearing result for Hearing Scheduled scheduled on 03/05/2012 09:30 AM: Continued
	CHGA	TCEMERYV	Judge Change: Administrative
	HRSC	TCEMERYV	Hearing Scheduled (Hearing Scheduled 05/29/2012 09:30 AM)
		TCEMERYV	Notice of Hearing [file stamped 03/08/2012]
3/27/2012	NOTC	TCLANGAJ	Amended Notice of Appeal
3/29/2012	OGAP	DCLYKEMA	Order Governing Procedure On Appeal
4/9/2012	NOTC	TCOLSOMC	Notice of Preparation of Appeal Transcript
4/16/2012	NOTC	TCTONGES	Notice of Lodging of Appeal Transcript
5/3/2012	CHGA	DCLYKEMA	Judge Change: Administrative
5/7/2012	TRAN	DCLYKEMA	Transcript Filed
	NOTC	DCLYKEMA	Notice of Filing Transcript on Appeal
5/29/2012	CONH	TCEMERYV	Hearing result for Hearing Scheduled scheduled on 05/29/2012 09:30 AM: Conference Held
6/11/2012	MOTN	TCTONGES	Motion for Extension
6/13/2012	AFFD	DCLYKEMA	Affidavit of Elizabeth Koeckeritz
6/19/2012	BREF	TCTONGES	Appellant's Brief
6/20/2012	ORDR	DCLYKEMA	Order for Extension
7/26/2012	COND	DCLYKEMA	Conditional ORder on Appeal
8/8/2012	BREF	TCBROWJM	Defendant's Brief
8/28/2012	BREF	TCTONGES	Reply Brief
9/19/2012	NOHG	TCOLSOMC	Notice Of Hearing
	HRSC	TCOLSOMC	Hearing Scheduled (Hearing Scheduled 10/18/2012 02:30 PM)
9/25/2012	BAAT	PDPRECJR	ATTORNEY REASSIGNED BY BATCH PROCESSING (batch process) Erik J O'Daniel, 6534 removed. PD Cawthon/Irby #2 assigned.
	BAAT	PDPRECJR	ATTORNEY REASSIGNED BY BATCH PROCESSING (batch process) PD Cawthon/Irby #2 removed. Heidi M Tolman, 8478 assigned.
9/27/2012	BAAT	PDPRECJR	ATTORNEY REASSIGNED BY BATCH PROCESSING (batch process) Heidi M Tolman, 8478 removed. PD Cawthon/Irby #2 assigned.

State of Idaho vs. Mark Christopher Hunter

Date	Code	User	Judge
9/27/2012	BAAT	PDPRECJR	ATTORNEY REASSIGNED BY BATCH PROCESSING (batch process) PD Cawthon/Irby #2 removed. Sheryl L Musgrove, 5233 assigned.
3/29/2013	MEMO	TCLYCAAM	Memorandum Decision and Order Kathryn A. Sticklen
	RMDC	TCLYCAAM	Remanded From District Court Kathryn A. Sticklen
	RMAN	TCLYCAAM	Remanded Kevin Swain
4/12/2013	DCHH	TCLYCAAM	Hearing result for Hearing Scheduled scheduled on 10/18/2012 02:30 PM: District Court Hearing Held Court Reporter: Roxanne Patchell Number of Transcript Pages for this hearing estimated: Less than 100 Kathryn A. Sticklen
	APSC	TCTONGES	Appealed To The Supreme Court Kevin Swain
	NOTA	TCTONGES	NOTICE OF APPEAL Kevin Swain
4/30/2013	HRSC	TCEMERYV	Hearing Scheduled (BC Pretrial Conference 05/20/2013 02:30 PM) Kevin Swain
	NOTH	TCEMERYV	Notice Of Hearing Kevin Swain
5/20/2013	CONH	TCEMERYV	Hearing result for BC Pretrial Conference scheduled on 05/20/2013 02:30 PM: Conference Held Kevin Swain
6/18/2013	NOTC	CCTHIEBJ	Notice of Transcript Lodged - Supreme Court Docket No. 40950 Kathryn A. Sticklen

BOISE POLICE DEPT.

1479588

IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
STATE OF IDAHO

COMPLAINT AND SUMMONS

- ☐ Infraction Citation
☒ Misdemeanor Citation
☐ Accident Involved
☐ Commercial Vehicle
Driven by this Driver

vs.

HUNTER

Last Name

MARK

First Name

CHRISTOPHER

Middle Initial

108-828

1479588

VIN #

USDOT TK Census #

☐ Operator ☐ Class A ☐ Class B ☐ Class C ☒ Class D ☐ Other

☐ GVWR 26001 + ☐ 16 + Persons ☐ Placard Hazardous Materials IPUC#

Home Address 911 BROOK TROUT LN MERIDIAN, ID 83642

Business Address _____ Ph # 440-8188

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

☒ DL ☐ ID ☐ V I certify I have reasonable grounds, and believe the above-named Defendant,

DL or SS# YB3058120 State ID Sex: ☒ M ☐ F

Height 507 Wt. 155 Hair BRO Eyes BLU DOB 2/11/83

Veh. Lic.# 1A2144 State ID Yr. of Vehicle 01

Make LEX Model LS3 Color YELL

Did commit the following act(s) on 4/16, 20 11 at 0003 o'clock A M.

Vio. #1 DUI - 2ND 18-8005(4)
Code Section

Vio. #2 _____
Code Section

Location MYRTLE / 8TH

Hwy. 4/16/11 Mp. BOISE ADA County, Idaho.

Date 4/16/11 Officer/Party GIBSON Serial #/Address 747 Audio Video ☒ ☒ POLICE DEPT.

Date 4/16/11 Witnessing Officer LACOW Serial #/Address 766 Dept.

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the

District Court of ADA County, BOISE, Idaho,

located at 200 W. FRONT STREET on or after _____, 20 _____,

but on or before _____, 20 _____, at 8 A.M.-4 o'clock PM.

I acknowledge receipt of this summons and I promise to appear at the time indicated.

ARRESTED
Defendant's Signature

I hereby certify service upon the defendant personally on 4/16, 20 11

Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1 MD-11-5903 04/18/11

000006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA.

THE STATE OF IDAHO,
Plaintiff,

vs.

HUNTER MARK C
Defendant

NOTICE OF COURT DATE

AND
BOND RECEIPT FILED P.M. 2:22

APR 22 2011

CHRISTOPHER D. RICH, Clerk
By STORMY McCORMACK
DEPUTY

YOU ARE HEREBY NOTIFIED that you must appear before the Court Clerk,
between 29 April 2011 and 06 May 2011 excluding Saturdays, Sundays, and Holidays,
from 09:00AM to 03:00PM at the:

Ada County Courthouse
200 West Front Street
Boise, 83702

You are further notified that if you fail to appear as specified herein, your bond
will be forfeited and a Warrant of Arrest will be issued against you.

BOND RECEIPT No: 522859

Charge: 18-8005-4 {M} DRIVING UNDER THE INFLUENCE (SECOND OFFENSE)

Bond Amount: \$ 1,000.00

Case #

Bond # DN5-2685149

Bond Type: Surety

Warrant #:

Agency: Aladdin/Anytime

Insurance: Danielson National Insurance Co

Bondsman: WELSH DANIELLE

Address: 80 N COLE RD
Boise, ID 83704

This is to certify that I have received a copy of this
NOTICE TO APPEAR. I understand that I am being released on the
conditions of posting bail and my promise to appear in the court
at the time, date, and place described in this notice.


DATED: 04/16/2011


DEFENDANT

PLEASE PRINT

(If defendant is a minor, a form must also be completed by parent or legal guardian)

CASE NO. MD-11-5903
NO. FILED
A.M. P.M. FILED

MAY 06 2011

APPLICATION FOR PUBLIC DEFENDER

CHRISTOPHER D. RICH, Clerk

By ANN

Mark Hunter
Defendant's Name
911 S. Brook Trout Way
Street Address
Meridian ID 83642
City State Zip Code

Mailing Address (if different from above)
City State Zip Code

[REDACTED] Birth Date(Month/Day/Year)
[REDACTED]
Driver's License Number
11
Home Phone 208-440-8188 Work Phone
Message Phone

EMPLOYMENT

Doolittle Law Chartered
Name of Current or Last Employer
Boise ID 83704
City State Zip Code
8/10 Current Part Time 29
Begin Date End Date Time on the Job Hours Per Week

Paid by the month ☒ hour ☐ Rate of Pay \$ 10

Date Unemployment Benefits Began (or will begin) Date Unemployment Benefits Terminate Monthly Unempl. (or anticipated income)

Name of Spouse's Current or Last Employer Phone
City State Zip Code
Begin Date End Date Time on the Job Hours Per week
Paid by the month ☐ hour ☐ Rate of Pay \$

FINANCIAL

No. Children You Are Supporting Monthly Support \$ No. Children Living With You 1 Ages 5
Child Support Current? Yes ☐ No ☐ Amount in Arrears \$ No. Adults Living With You 1 Relationships Girlfriend

ASSETS

Rent ☒ or Own ☐ Your Home
Equity In Home \$ N/A
Equity in Other Land or Property \$ N/A
Year and Make of Vehicle(s) 2002 Chevy Trailblazer
Equity in Vehicle(s) \$ N/A
Cash on Hand \$ N/A
Cash in Checking Accounts \$ 2500
Name of Bank Wells Fargo
Cash in Savings Accounts \$ 24100
Name of Bank Wells Fargo
Other Assets NA \$ N/A

Mortgage Loan Balance \$ N/A
Property Loan Balance \$ N/A
Vehicle Loan Balance \$ N/A
Checking Acct. No. NA N/A
Savings Acct. No. NA N/A

HOUSEHOLD MONTHLY INCOME

HOUSEHOLD MONTHLY DEBTS

Your Wages (Take-home, Before Garnishments) \$ 1400
 Spouse's Wages (Take-home) \$ N/A
 Other Household Member Wages \$ ~~1400~~ NA
 A.F.D.C. \$ N/A
 Social Security \$ N/A
 S.S.I. / S.S.D. \$ N/A
 Unemployment Insurance \$ N/A
 Veterans Benefits \$ N/A
 Retirement/Pension \$ N/A
 Child Support/Alimony \$ N/A
 Other \$ N/A
 Total Monthly Income \$ ~~1400~~ 132

Rent or Mortgage Paid By You \$ 400
 Car Payment \$ 158
 Food \$ ~~158~~ NA
 Utilities \$ NA
 Transportation (Gas) \$ 220
 Auto Insurance \$ 25
 Day Care \$ NA
 Educational Loans \$ NA
 Credit Cards \$ NA
 Medical \$ NA
 Child Support/Alimony \$ NA
 Court Fines \$ NA
 Other Gum / Phone \$ ~~205~~ 205
 Total Monthly Debts \$ 103
Me →

Amount of money remaining at the end of each month \$ 132

If you are under legal age, who is your parent or guardian?

Who will assist you financially?

Name _____ Phone _____
 City _____ State _____ Zip Code _____

Name _____ Phone _____
 City _____ State _____ Zip Code _____

STATE OF IDAHO)
) ss.
 County of Ada)

I am requesting that a lawyer be appointed to represent me, and I understand that I may be required to reimburse the public defender at the end of my case. I swear under penalty of perjury that the answers above are true and correct to the best of my knowledge.

Applicant's Signature _____

Date 5/7/11

SUBSCRIBED and SWORN to before me on 5/10/11

CHRISTOPHER D. RICH
 Clerk of the District Court

By A. Campbell
 Deputy Clerk

000009

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

NO. FILED
A.M. P.M.

MAY 09 2011

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

CHRISTOPHER D. RICH, Clerk
By ERIN PENA
DEPUTY

Case No: CR-MD-2011-0005903

**NOTICE OF APPOINTMENT OF PUBLIC DEFENDER
AND SETTING CASE FOR HEARING**

☐ Ada ☒ Boise ☐ Eagle ☐ Garden City ☐ Meridian

TO: Ada County Public Defender

YOU ARE HEREBY NOTIFIED that you are appointed to represent the defendant in this cause, or in the District Court until relieved by court order. The case is continued for:

BC Pretrial Conference Monday, June 27, 2011 03:15 PM
Judge: Kevin Swain

Jury Trial Friday, July 22, 2011 08:15 AM
Judge: Kevin Swain

BOND AMOUNT: _____ The Defendant is: ☐ In Custody ☐ Released on Bail ☐ ROR

TO: The above named defendant

IT HAS BEEN ORDERED BY THIS COURT that the defendant is to contact the Ada County Public Defender's Office at 200 W. Front Street, Room 1107, Boise, Idaho 83702. Telephone: (208) 287-7400. If the defendant is unable to post bond and obtain his/her release from jail, that the proper authorities allow the defendant to make a phone call to the Ada County Public Defender.

IT HAS BEEN FURTHER ORDERED: That the parties, prior to the pre-trial conference, complete and comply with Rule 16 I.C.R. and THAT THE DEFENDANT BE **PERSONALLY PRESENT** AT BOTH THE PRE-TRIAL CONFERENCE AND / OR THE JURY TRIAL: FAILURE TO APPEAR AT EITHER THE PRE-TRIAL CONFERENCE OR THE JURY TRIAL WILL RESULT IN A **BENCH WARRANT** FOR THE DEFENDANT'S ARREST.

Dated : 5/6/2011

Deputy Clerk

I hereby certify that copies of this Notice were served as follows on this date Friday, May 06, 2011.

Defendant: Mailed Hand Delivered ☒
Clerk / date

Signature
Phone (208) 440-8188

Prosecutor: Interdepartmental Mail

Public Defender: Interdepartmental Mail

Deputy Clerk

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

NO. _____ FILED _____
A.M. 11:00 P.M.

MAY 12 2011

CHRISTOPHER D. RICH, Clerk
By LANI BROXSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff

vs.

MARK CHRISTOPHER HUNTER,

Defendant.

Case No. CR-MD-2011-0005903

REQUEST FOR DISCOVERY

TO: THE STATE OF IDAHO, Plaintiff, and to BOISE CITY PROSECUTING
ATTORNEY:

PLEASE TAKE NOTICE, that the undersigned, pursuant to ICR 16, requests discovery
and photocopies of the following information, evidence, and materials:

- 1) All **unredacted** material or information within the prosecutor's possession or control, or which thereafter comes into his possession or control, which tends to negate the guilt of the accused or tends to reduce the punishment thereof. ICR 16(a).
- 2) Any **unredacted**, relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence; and also the substance of any relevant, oral statement made by the defendant whether before or after arrest to a peace officer, prosecuting attorney or the prosecuting attorney's agent; and the recorded testimony of the defendant before a grand jury which relates to the offense charged.
- 3) Any **unredacted**, written or recorded statements of a co-defendant; and the substance of any relevant oral statement made by a co-defendant whether before or after arrest in response to interrogation by any person known by the co-defendant to be a peace officer or agent of the prosecuting attorney.
- 4) Any prior criminal record of the defendant and co-defendant, if any.
- 5) All **unredacted** documents and tangible objects as defined by ICR 16(b)(4) in the possession or control of the prosecutor, which are material to the defense, intended for use by the prosecutor or obtained from or belonging to the defendant or co-defendant.

- 6) All reports of physical or mental examinations and of scientific tests or experiments within the possession, control, or knowledge of the prosecutor, the existence of which is known or is available to the prosecutor by the exercise of due diligence.
- 7) A written list of the names, addresses, records of prior felony convictions, and written or recorded statements of all persons having knowledge of facts of the case known to the prosecutor and his agents or any official involved in the investigatory process of the case.
- 8) A written summary or report of any testimony that the state intends to introduce pursuant to rules 702, 703, or 705 of the Idaho Rules of Evidence at trial or hearing; including the witness' opinions, the facts and data for those opinions, and the witness' qualifications.
- 9) All reports or memoranda made by police officers or investigators in connection with the investigation or prosecution of the case, including what are commonly referred to as "ticket notes."
- 10) Any writing or object that may be used to refresh the memory of all persons who may be called as witnesses, pursuant to IRE 612.
- 11) Any and all audio and/or video recordings made by law enforcement officials during the course of their investigation.
- 12) Any evidence, documents, or witnesses that the state discovers or could discover with due diligence after complying with this request.

The undersigned further requests written compliance within 14 days of service of the within instrument.

DATED, Wednesday, May 11, 2011.



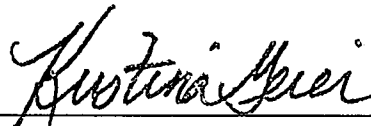
ERIK L. DANIEL
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on Wednesday, May 11, 2011, I mailed a true and correct copy of the within instrument to:

BOISE CITY PROSECUTING ATTORNEY
Counsel for the State of Idaho

by placing said same in the Interdepartmental Mail.



MAY 17 2011

CHRISTOPHER D. RICH, Clerk
By LANI BROXSON
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR-MD-2011-0005903
)	
v.)	
)	
MARK C HUNTER,	)	RESPONSE TO REQUEST
	)	FOR DISCOVERY
)	
Defendant.)	
_____)	

COMES NOW, the state of Idaho, by and through Jeremiah R. Taylor, Assistant City Attorney, and submits the following Response to Request for Discovery:

The State has complied with such request by furnishing the following information, evidence and materials with the exception of witness and victim dates of birth, driver's license numbers and/or social security numbers:

1. Copies of:

Idaho State Police Forensic Services Certificate of Calibration for Instrument Serial No. #90205667
Certificate of Analysis for Solution Lot #10802, 10103
Boise Police Department Officer Certification Records for the Intoxilyzer 5000 series or Lifeloc FC20

Ada County Jail Booking Sheet(s)
Ada County Jail Intoxilyzer – Alcohol Analyzer Form
Boise Police Department General Report DR# 108-828
Field Sobriety Test
Boise Police Department Supplemental Report DR# 108-828
- Ofc. R. Gibson
Boise Police Department Supplemental Report DR# 108-828
- Ofc. J. Lacow
Suspension Advisory Form
NCIC – KQ
Boise Police Department Idaho Uniform Citation(s)
Idaho Transportation Department Driving Record
Withheld Judgment
Booking Photo
Ada County Law Enforcement Arrest Record

2. Defendant advised of existence and allowed access to when available (for audio or video tapes, see paragraph #7):

Intox 5000 series Instrument or Lifeloc FC20 Operations Log for Serial Number 90205667
Audio Tape and/or Digital Audio Recording(s)

3. Results of examination and tests:

Intoxilyzer Results: .090/.088

4. The State intends to call as witnesses:

Idaho State Police Forensic Lab Representative, PO Box 700. Meridian, ID 83680
(208) 884-7170
Officer Robert D. Gibson Ada #747, Boise Police Department, 333 N. Mark Stall Place, Boise, ID 83704, (208) 570-6000
Officer Jeremy D Lacow Ada #766, Boise Police Department, 333 N. Mark Stall Place, Boise, ID 83704, (208) 570-6000
Carrie Leigh-Ann Pereira, 911 Brooktrout Way, Meridian, ID 83642, 407-3999

And any other individuals identified in the discovery materials.

5. The Idaho criminal history for Defendant and/or witnesses, if such history exists, can be found using the on-line *Idaho Supreme Court Data Repository* at: <https://www.idcourt.us>
6. There may be other relevant information or documents on this case contained in the Court file.
7. If the citation and/or police report reflect the existence of audio or video recording(s), please email a request to BCAO@cityofboise.org including the case number and the

name of the defendant OR contact the legal secretary for the undersigned to make arrangements to do one of the following:

- a) Have the digital audio tape file sent to the email address on file for your office;
- b) Listen and/or view the audiotape, videotape, and/or CD at the Boise City Attorney's office;
- c) Make a copy of the audio file, video file or compact disc at our office using our high-speed dubbing machine;
- d) Make a copy of the videotape at our office using our double-deck video cassette recorder;
- e) Fill out a request form and provide blank media to the office to have a copy available for pickup after three business days.

8. Intoxilyzer 5000 series or Lifeloc FC20 Maintenance Log and Records:

- a) Maintenance conducted on the instrument is noted on the Intox. 5000 series Instrument Operations Log or Lifeloc FC20 Log; no separate maintenance log is kept. All internal maintenance is reflected in a voluminous collection of maintenance documents; copies of said maintenance documents are kept at the Boise City Attorney's Office. Defense counsel may make arrangements to view said copies by contacting the handling attorney in this case.

9. Documents Relating to the Intoxilyzer 5000 series Detecting Acetone or Other Interfering Substances:

- a) Please refer to the *Idaho Intoxilyzer 5000 Series Reference Manual*, pages 25 & 29 for relevant information. See below for how to obtain said manuals.

10. Intoxilyzer Manual and Lifeloc FC20 Manual:

- a) Manuals relating to the Intoxilyzer and the Lifeloc FC20 may be obtained via the Internet at <http://www.isp.idaho.gov/forensic/certificates.html#CofA>

11. Certificate of Analysis for the Solution Lot:

- a) The Certificate of Analysis for the Solution Lot may also be found on the Idaho State Police Forensic Services website at:
<http://www.isp.idaho.gov/forensic/certificates.html#CofA>
- b) For certificates that are not listed on the webpage, please contact Forensic Services at P.O. Box 700, Meridian, ID 83680-0700, 208-884-7219.

12. Alco-Sensor:

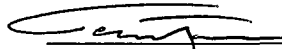
- a) No similar records are maintained on the hand-held Alco-Sensor because the instrument is used merely to detect the presence of alcohol, not to obtain a specific BAC.

13. Officer Certification and Training Records:

a) The list containing officer certification information is attached hereto. Defense counsel may submit a specific written request to the POST Academy care of Trish Christy, 700 S. Stratford Drive, Meridian, Idaho 83642 for information regarding a specific officer's training history, including which year (color) of N.H.T.S.A. training manual was used and if/when the officer may have taken a refresher training. If counsel has questions regarding the request, they may contact Ms. Christy at 208-884-7253.

14. The State recognizes its on-going duty to supplement this Response to Discovery should additional evidence relevant to this case arise.

DATED this 13 day of May, 2011.


Jeremiah R. Taylor
Assistant City Attorney

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on this 13 day of May, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

☐ **US MAIL**
☒ **INTERDEPARTMENT MAIL**
☐ **FACSIMILE**
☐ **HAND DELIVER**



MAY 17 2011

CHRISTOPHER D. RICH, Clerk
By LANI BROXSON
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

v.

MARK C HUNTER,

Defendant.

Case No. CR-MD-2011-0005903

REQUEST FOR DISCOVERY

TO: Erik J. O'Daniel:

PLEASE TAKE NOTICE that the undersigned, pursuant to Rule 16 of the Idaho Criminal Rules, requests discovery and inspection of the following information, evidence and materials:

1. **DOCUMENTS AND TANGIBLE OBJECTS** -- Books, papers, documents, photographs, tangible objects or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce in evidence at trial.

2. **REPORTS OF EXAMINATION AND TESTS** -- Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, or copies thereof, within the possession or control of Defendant, which

defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom Defendant intends to call at the trial when the results or reports relate to testimony of the witness. .

3. **DEFENSE WITNESSES** – Name(s), address(es), and phone number(s) of any witnesses Defendant intends to call at trial.


4. **EXPERT WITNESSES** – Name(s), address(es), and phone number(s) of any expert witness Defendant intends to call at trial. With respect to each expert witness, please provide a written summary describing the testimony the witness intends to introduce, including the witness's opinions, the facts and data for those opinions, and the witness's qualifications.

The undersigned further requests permission to inspect and copy said information, evidence and materials prior to the 27th day of May, 2011, at a time and place mutually agreeable to the parties hereto.

FURTHER, please take notice that the undersigned prosecutor, pursuant to Idaho Code Section 19-519, demands the defendant to serve, within ten (10) days, upon the prosecutor, a written notice of defendant's intention to offer alibi. Such notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

YOU ARE FURTHER notified of the requirement to disclose any additional witnesses promptly to the prosecutor named below as they become known to you.

DATED this 13 day of May, 2011.



Jeremiah R. Taylor
Assistant City Attorney

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on this 13 day of May, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

☐ **US MAIL**
☒ **INTERDEPARTMENT MAIL**
☐ **FACSIMILE**
☐ **HAND DELIVER**

A handwritten signature in black ink, appearing to be "Erik J. O'Daniel", is written over a horizontal line.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, ADA COUNTY, MAGISTRATE DIVISION

STATE OF IDAHO,

Plaintiff,

vs.

Mark Hunter

Defendant.

MD 11
Case No. 5903

PRE-TRIAL MEMORANDUM
AND MINUTE ENTRY

FILED
P.M. 4:16

☒ In Chambers

JUN 27 2011

CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

Appearances: ☐ AC ☒ BC ☐ EC ☐ GC ☐ MC

Prosecutor JT

Defense Counsel [Signature]

Interpreter _____

☐ Jury trial waived and case is to be re-set for court trial.

☐ Plea and sentence via Defense Counsel authorized by Defendant: Rule 6(d), IMR
and/or IIR.

☐ Pre-trial motions, timely filed, are set for hearing on _____, at
_____ .m.

☐ Case is re-set for _____ at _____ .m.

☐ Defendant failed to appear. Absence not explained, justified, or excused.
Trial date vacated. Bond forfeited/ROR revoked. Bench Warrant issued.
Bond set at \$ _____.

☒ Other: Use JT as PTC

Δ° to consult expert .088/.090

Dated this 27 day of June

2011

Defendant

Address: _____

Telephone: _____

Clerk: _____

[Signature]
Counsel for Defendant

[Signature]
Deputy Prosecuting Attorney

[Signature]
Magistrate Judge

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB: 2/11/1983

Scheduled Event: BC Pretrial Conference Monday, June 27, 2011 03:15 PM

Judge: Kevin Swain

Clerk:

Micky Emery

Interpreter:

Prosecuting Agency: ☐ AC ☒ BC ☐ EA ☐ GC ☐ MC

Pros:

PD/Attorney:

Yenny Taylor
Erik O'Daniel

• 1118-8004 M2 Driving Under the Influence-(Second Offense) M

☐ Case Called Defendant: ☒ Present ☐ Not Present ☐ In Custody☐ Advised of Rights ☐ Waived Rights ☐ PD Appointed ☐ Waived Attorney☐ Guilty Plea / PV Admit ☐ N/G Plea ☐ Advise Subsequent Penalty☐ Bond \$ ☐ ROR ☐ Pay / Stay ☐ Payment Agreement☒ In Chambers ☒ PT Memo ☐ Written Guilty Plea ☐ No Contact Order

Court

Per P T memo

trial date further PTC

7/22/2011 @ 8:15

Finish () Release Defendant

FILED 7/22/11 AT 9:30 P.M.
CHRISTOPHER D. RICH,
CLERK OF THE DISTRICT COURT
BY Michael J. Emery
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO

Plaintiff,

vs.

Mark Hunter

Defendant.

MO 2011

Case No. 5903

TRIAL STATUS MEMORANDUM

Appearances: Prosecutor BC - JT

Defense Counsel JD

☐ This case is ready for trial.

☒ Discovery has been completed. ^{NOT}

☒ Cut off date for discovery is 10 days before.

☒ State is to prepare a formal complaint for trial. (by _____)

☐ Parties are to prepare proposed jury instruction on the elements of count(s) _____.

☐ The State does not intend to amend the charge.

☐ The State may amend the charge to _____.

☒ The parties anticipate the case can be tried in one day.

☐ Courtroom media equipment will be needed. (The attorneys are responsible for the presentation of evidence.)

☒ Motions subject to Idaho Criminal Rule 12(b) have been heard.

☐ Other A waives speedy trial

^{XS} As set after
Sept 20 J.T.
Aug. 10, 2011

[Signature]
Prosecuting Attorney

22 of JULY 2011

Date

[Signature]
Defense Counsel

[Signature]
Magistrate

A^A COUNTY MAGISTRATE MINUT^S

Mark Christopher Hunter CR-MD-2011-0005903

DOB: 2/11/1983

Scheduled Event: BC Pretrial Conference Friday, July 22, 2011 08:15 AM

Judge: Kevin Swain

Clerk:

Wicky Emery

Interpreter:

Prosecuting Agency: AC BC EA GC MC

Pros:

Jerry Taylor

(PD / Attorney:

Erik Daniel

• 1118-8004 M2 Driving Under the Influence-(Second Offense) M

_____ Case Called Defendant: ☒ Present _____ Not Present _____ In Custody

_____ Advised of Rights _____ Waived Rights _____ PD Appointed _____ Waived Attorney

_____ Guilty Plea / PV Admit _____ N/G Plea _____ Advise Subsequent Penalty

_____ Bond \$ _____ ROR _____ Pay / Stay _____ Payment Agreement

☒ In Chambers trial ☒ Memo _____ Written Guilty Plea _____ No Contact Order

Court

Case not settled

July 8-10-2011 @ 8:15

Finish () Release Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

200 W. Front Street, Boise, Idaho 83702

JUL 25 2011

CHRISTOPHER D. RICH, Clerk
By ERIN PENA
DEPUTY

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

Case No: CR-MD-2011-0005903

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Jury Trial...Wednesday, August 10, 2011...08:15 AM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows:

Defendant: Mailed ✓ Hand Delivered 7/25 Signature _____
Clerk _____ Date _____ Phone () _____

Erik J O'Daniel
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Prosecutor: Interdepartmental Mail 7/25 ☐ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian
Clerk _____ Date _____

Public Defender: Interdepartmental Mail 7/25
Clerk _____ Date _____

Other: _____

Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Dated: 7/22/2011

CHRISTOPHER D. RICH
Clerk of the Court

By: _____
Deputy Clerk

JUL 27 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Laurie A. Fortier
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 6173

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,

Plaintiff,

v.

MARK C HUNTER,

Defendant.

Case No. CR-MD-2011-0005903

**SUPPLEMENTAL RESPONSE TO
REQUEST FOR DISCOVERY**

COMES NOW, the state of Idaho, by and through Laurie A. Fortier, Assistant City Attorney, and submits the following Supplemental Response to Request for Discovery:

The State has complied with such request by furnishing the following additional information, evidence, and/or materials:

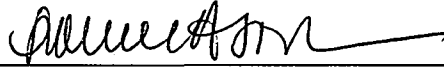
1: Additional Witnesses:

Jeremy Johnston or designee, Idaho State Police Forensic Services
615 W. Wilbur Suite B, Coeur d'Alene, ID 83815, (208) 209-8700 – expert witness

2: Disclosure of:

Curriculum vitae of Jeremy Johnston

DATED this 24 day of July, 2011.



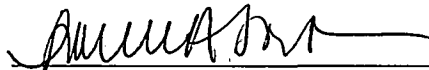
Laurie A. Fortier
Assistant City Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27 day of July, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

☐ US MAIL
☒ INTERDEPARTMENTAL MAIL
☐ FACSIMILE
☐ HAND DELIVER



JUL 29 2011

CHRISTOPHER D. RICH, Clerk
By LANI BROXSON
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Laurie A. Fortier
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 6173

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR-MD-2011-0005903
)	
v.)	
	)	SUPPLEMENTAL RESPONSE TO
MARK C HUNTER,	)	REQUEST FOR DISCOVERY
)	
Defendant.)	
_____)	

COMES NOW, the state of Idaho, by and through Laurie A. Fortier, Assistant City Attorney, and submits the following Supplemental Response to Request for Discovery:

The State has complied with such request by furnishing the following additional information, evidence, and/or materials:

1: Disclosure of:

Copy certified Judgment of Conviction - CR-MD-2007-0016082

DATED this 28 day of July, 2011.



Laurie A. Fortier
Assistant City Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28 day of July, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

☐ ELECTRONIC
☒ INTERDEPARTMENTAL MAIL
☐ FACSIMILE
☐ HAND DELIVER
☐ US MAIL



AUG 02 2011

CHRISTOPHER D. RICH, Clerk
By AMY LANG
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Laurie A. Fortier
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 6173

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR-MD-2011-0005903
)	
v.)	
	)	SUPPLEMENTAL RESPONSE TO
MARK C HUNTER,	)	REQUEST FOR DISCOVERY
)	
Defendant.)	
_____)	

COMES NOW, the state of Idaho, by and through Laurie A. Fortier, Assistant City Attorney, and submits the following Supplemental Response to Request for Discovery:

The State has complied with such request by furnishing the following additional information, evidence, and/or materials:


1: Additional Witnesses:

Rachel Cutler or designee, Idaho Bureau of Forensic Services, PO Box 700, Meridian, ID 83680, (208) 884-7170 – expert witness

2: Disclosure of:

Curriculum Vitae of Rachel Cutler

DATED this 1 day of August, 2011.




Laurie A. Fortier
Assistant City Attorney

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on this 1 day of August, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

☐ **ELECTRONIC**
☒ **INTERDEPARTMENTAL MAIL**
☐ **FACSIMILE**
☐ **HAND DELIVER**
☐ **US MAIL**



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, ADA COUNTY, MAGISTRATE DIVISION

STATE OF IDAHO,

Plaintiff,

vs.

Mark Hunter

Defendant.

Case No. MD 2011
5903

PRE-TRIAL MEMORANDUM
AND MINUTE ENTRY

☒ In Chambers

AUG 10 2011

CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

Appearances: ☐ AC ☒ BC ☐ EC ☐ GC ☐ MC

Prosecutor Fortier

Defense Counsel [Signature]

Interpreter _____

☐ Jury trial waived and case is to be re-set for court trial.

☐ Plea and sentence via Defense Counsel authorized by Defendant: Rule 6(d), IMR
and/or IIR.

☐ Pre-trial motions, timely filed, are set for hearing on _____, at
_____ .m.

☐ Case is re-set for _____ at _____ .m.

☐ Defendant failed to appear. Absence not explained, justified, or excused.
Trial date vacated. Bond forfeited/ROR revoked. Bench Warrant issued.
Bond set at \$ _____.

☒ Other: Parties stip to reset JT. Defense requested
a further setting last time per TSM 22 July but
court set quickly. Δ getting married 3 Sept and out of
state 6-20 Sept. J.P. 10-12-11

Dated this 10 day of Aug, 2011

Defendant

Address: _____

Telephone: _____

Clerk: _____

Counsel for Defendant

Deputy Prosecuting Attorney

Magistrate Judge

MLT
Speedy
Waived

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB: 2/11/1983

Scheduled Event: Jury Trial Wednesday, August 10, 2011 08:15 AM

Judge: Kevin Swain

Clerk: Hecky Emery

Interpreter: _____

Prosecuting Agency: AC X BC EA GC MCPros: Laure Fortier

(PD)

Attorney: Erik O'Daniel

• 1118-8004 M2 Driving Under the Influence-(Second Offense) M

_____ Case Called Defendant: / Present _____ Not Present _____ In Custody

_____ Advised of Rights _____ Waived Rights _____ PD Appointed _____ Waived Attorney

_____ Guilty Plea / PV Admit _____ N/G Plea _____ Advise Subsequent Penalty

_____ Bond \$ _____ ROR _____ Pay / Stay _____ Payment Agreement

/ In Chambers / PT Memo _____ Written Guilty Plea _____ No Contact OrderCourtPier PT memo set overJury 10-12-2011 @ 8:15

Finish () Release Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA 8:38 FILED
MAGISTRATE DIVISION

200 W. Front Street, Boise, Idaho 83702

AUG 10 2011

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

CHRISTOPHER D. RICH, Clerk
By MELANIE TOLL
DEPUTY

Case No: CR-MD-2011-0005903

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Jury Trial...Wednesday, October 12, 2011...08:15 AM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows:

Defendant: Mailed _____ Hand Delivered X Signature [Signature]
Clerk MTD Date AUG 10 2011 Phone (208) 440-3188

Erik J O'Daniel
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Prosecutor: Interdepartmental Mail _____ ☐ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian
Clerk [Signature] Date 8/16

Public Defender: Interdepartmental Mail X
Clerk [Signature] Date 8/16

Other: _____

Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Dated: 8/10/2011

CHRISTOPHER D. RICH
Clerk of the Court

By: [Signature]
Deputy Clerk

NOTICE OF HEARING

000033

394
JT
10/12
8:15

ERIK J. O'DANIEL
Deputy Public Defender
200 W. Front St., Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
ISB# 6534

NO. _____
A.M. _____ FILED P.M. 2 08

OCT 05 2011

CHRISTOPHER D. RICH, Clerk
By MAURA OLSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

STATE OF IDAHO,
Plaintiff,

vs.

MARK C. HUNTER,
Defendant.

CR-MD-2011-5903

**MOTION TO VACATE JURY TRIAL,
ENLARGE TIME AND SET HEARING
ON SUPPRESSION ISSUE**

COMES NOW counsel for the above-named Defendant and moves this court to vacate the jury trial set for 12 October 2011, and set this case for a suppression hearing. Counsel asserts the warrantless detention exceeded the scope allowed during a traffic stop, pursuant to the Sixth Amendment to the United States Constitution, and Article I, Section 17 of the Constitution of the State of Idaho.

Counsel requests an enlargement of time on the basis of good cause. Counsel does not recall encountering previously the fact-pattern present in this case, and his research indicates this may be a case of first impression in Idaho. This case also includes the use of a Lifeloc device, which only recently has come into use in this area. (Counsel believes Boise City started using these just the beginning of 2011.) Counsel represents to the court that he feels he should have caught this issue and this can be litigated either prior to trial or through a post-conviction action, but it should be litigated.

**MOTION TO VACATE JURY TRIAL, ENLARGE TIME AND SET HEARING
ON SUPPRESSION ISSUE**

000034

9

WHEREFORE, the Defendant respectfully requests a hearing in the above-entitled matter.

DATED, 5 October 2011.



Erik O'Daniel
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 5 October 2011, I caused to be hand-delivered to the **BOISE CITY ATTORNEY** a true and correct copy of the foregoing document.



Erik O'Daniel

394
JT
10/12
8:15

NO. _____ FILED 2:40
A.M. _____ P.M.

OCT 07 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Kevin S. Borger
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 3550

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR-MD-2011-5903
)	
vs.)	
	)	OBJECTION TO MOTION TO
MARK C. HUNTER,	)	SUPPRESS
)	
Defendant.)	
_____)	

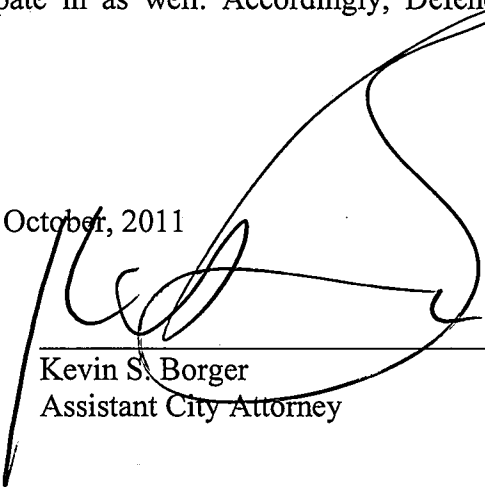
COMES NOW the State of Idaho, by and through its attorney of record, Kevin S. Borger, Assistant City Attorney, and moves this court for its order denying the Defendant's Motion to Suppress based upon its untimely filing. Defendant's Motion to Suppress was filed originally on October 5, 2011. The filing is untimely in that Idaho Criminal Rule 12(d) mandates that such motions "must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial whichever is earlier..." Defendant entered his not guilty plea on May 6, 2011 and the matter was then scheduled for a pre-trial conference on June 27, 2011 and a jury

9

trial on July 22, 2011. Thus, Defendant's Motion to Suppress is untimely as it should have been filed no later than June 3, 2011.

Rule 12(d) does provide that the court may relieve a party of failure to comply with the rule and enlarge the time provided "for good cause shown, or for excusable neglect". There have been three pre-trial conferences in this case. June 27, 2011, July 22, 2011 was a jury trial date that was converted to a jury trial date and August 10, 2011 was also a jury trial date at which a stipulation to reset was reached. Only now had the Defendant filed a motion to enlarge time and he has made no showing of good cause or excusable neglect. The State provided discovery to the Defendant on May 17, 2011. On this subject, the Idaho Court of Appeals has stated: "Allowing untimely motions to be heard because they appear meritorious eviscerates the purpose of the rule." *State v. Dice*, 126 Idaho 595, 597 (Ct. App. 1994). For the Defense to threaten to appeal based upon ineffective assistance of council is just another means by which the Defendant seeks to "eviscerate" Rule 12(d). This is something the courts have not been willing to do and something this court should not participate in as well. Accordingly, Defendant's Motion to Suppress must be denied.

DATED this 7 day of October, 2011



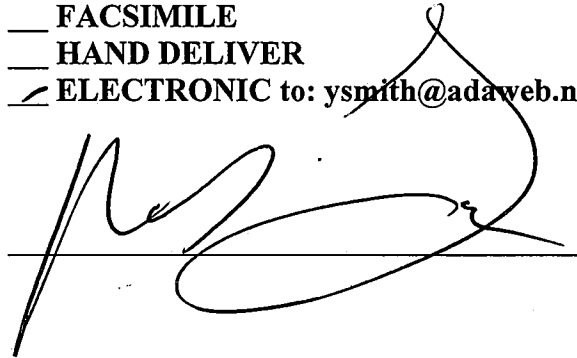
Kevin S. Borger
Assistant City Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6 day of October, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

☐ US MAIL
☐ INTERDEPARTMENT MAIL
☐ FACSIMILE
☐ HAND DELIVER
☒ ELECTRONIC to: ysmith@adaweab.net

A handwritten signature in black ink, appearing to be 'Erik J. O'Daniel', is written over a horizontal line.

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB: 2/11/1983

Scheduled Event: Jury Trial Wednesday, October 12, 2011 08:15 AM

Judge: Kevin Swain

Clerk: Hecky Emery

Interpreter: _____

Prosecuting Agency: AC BC EA GC MCPros: Kevin BorgesPD / Attorney: Eric O'Hanrahan

• 1118-8004 M2 Driving Under the Influence-(Second Offense) M

_____ Case Called Defendant: ☒ Present _____ Not Present _____ In Custody

_____ Advised of Rights _____ Waived Rights _____ PD Appointed _____ Waived Attorney

_____ Guilty Plea / PV Admit _____ N/G Plea _____ Advise Subsequent Penalty

_____ Bond \$ _____ ROR _____ Pay / Stay _____ Payment Agreement

☒ In Chambers _____ PT Memo _____ Written Guilty Plea _____ No Contact OrderCourtSet suppress hearing11-7-2011 @ 3:30

Finish () Release Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

200 W. Front Street, Boise, Idaho 83702

OCT 14 2011

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

CHRISTOPHER D. RICH, Clerk
By ERIN PENA
DEPUTY

Case No: CR-MD-2011-0005903

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Motion to Suppress...Monday, November 07, 2011...03:30 PM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows:

Defendant: Mailed Y Hand Delivered 10/14
Clerk Date

Signature _____
Phone () _____

Erik J O'Daniel
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed _____ Hand Delivered _____
Clerk Date

Signature _____
Phone () _____

Prosecutor: Interdepartmental Mail Clerk 10/14 ☒ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian

Public Defender: Interdepartmental Mail Clerk 10/14

Other: _____

Mailed _____ Hand Delivered _____
Clerk Date

Signature _____
Phone () _____

Dated: 10/12/2011

CHRISTOPHER D. RICH
Clerk of the Court

By: Erin Pena
Deputy Clerk

394
HS
11/7
3:30

NO. _____ FILED _____
A.M. _____ P.M. 4:27

OCT 31 2011

ERIK J. O'DANIEL
Deputy Public Defender
200 W. Front St., Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
ISB# 6534

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

STATE OF IDAHO,)	
Plaintiff,	)	CR-MD-2011-5903
)	
vs.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO SUPPRESS EVIDENCE
MARK HUNTER,)	
Defendant.)	

COMES NOW counsel for the above named defendant and submits this memorandum in support of his motion filed 5 October 2011.

A. TIMELINESS

Idaho Criminal Rule 12(b)(3) governs motions to suppress evidence on the ground that it was obtained illegally. Generally, Idaho Criminal Rule 12(d) requires that such motion be filed within 28 days of entry of a plea of not guilty. However, the trial court is granted discretion to shorten or enlarge the time, and may excuse non-compliance for good cause or excusable neglect. A court's exercise of discretion will not be reversed on appeal unless the court fails to recognize the issue as one of discretion, the court acts outside its discretion, or the court arrives at its ruling without reason.

The Idaho Supreme Court appears to have first addressed this rule in State v. Alanis, 109 Idaho 884, 712 P.2d 585 (1985). In that case, counsel for Alanis filed a motion to suppress statements made during a police interview, which motion was filed the Friday before the Monday case was set to go to trial. The state objected to the motion and requested a continuance. The court denied a continuance but set argument on the motion to Tuesday morning, and then the parties picked a jury. After argument on Tuesday, the court granted the

motion and the case was to proceed to trial. The state informed the court it could not proceed without the suppressed evidence and the court entered a judgment of acquittal. The state appealed.

The Idaho Supreme Court heard the appeal under its Constitutional plenary power to address issues of compelling importance to the administration of justice. In five opinions, the Court discusses ICR 12(d) and double jeopardy issues. A number of reasons for the rule are offered, including: speedy resolution of pre-trial issues that may be dispositive, so that a party might pursue interlocutory appeal; avoidance of eleventh-hour motions that might be made to put the state on its heels right before trial; and avoidance of inconvenience to jurors.

In Alanis, defense counsel could not offer any explanation for the late motion. The court took it up anyway and suppressed evidence. A jury had been called already so double jeopardy attached and the state failed to put on any evidence. Alanis is a convoluted case, but an overriding theme among the opinions is that due process requires fairness. The Idaho Supreme Court appears to have addressed ICR 12(d) in three other cases, none of which are helpful. State v. Kirkwood, 111 Idaho 623 (1986); State v. Stevens, 126 Idaho 822 (1995); State v. Bicknell, 140 Idaho 201 (2004). The Idaho Court of Appeals has addressed ICR 12(d) in several cases, but usually in a situation where the court never inquired into good cause or excusable neglect.

Counsel for the defendant is a deputy public defender at the Office of the Ada County Public Defender. Counsel has an "involuntary caseload" and cannot set a limit on the number of clients he represents. As part of the county public defender staff, counsel is assigned to cover other public defender calendars, either because of illness, vacation or because additional coverage is needed. No individual case on his calendar is more important than any other case and he must allocate his time appropriately.

A recent case illustrates this difficulty. While providing coverage on another calendar, counsel represented a client on a misdemeanor violation of Idaho Code § 49-301. In reality,

the client's license was only expired, an infraction violation of I.C. § 49-319. Counsel had to deal with a city attorney, judge's clerk, and magistrate judge that all believed the client was guilty of the misdemeanor. While certainly not the crime of the century, counsel was required to spend time and effort defending even this client from "the system." Pleading the client to the misdemeanor would have been malpractice and a violation of professional responsibility.

Indigent defendants are entitled to competent representation and counsel represents to the court that his caseload and obligations as a public defender interfered with the representation in this case. A public defender is a jack-of-all-trades – master of none. If counsel were in private practice and represented only two- or three-dozen DUI defendants, possibly he would have caught this issue. That is not the case, however. The government cannot give with one hand the constitutional right of competent counsel, only to take that right with the other hand through overburdened calendars. Counsel does not know what errors he might make in his cases – he hopes very few. However, counsel knows he erred in this case and Hunter should not bear the brunt of that error.

B. SUPPRESSION


On the facts as disclosed by the state's discovery response, shortly after midnight, Hunter was stopped for failing to have headlights on when operating a vehicle on a roadway. He admitted to prior consumption of alcohol, stopping a few hours before he operated the vehicle. Police officers administered standard field sobriety tests. On the HGN test they scored him at 6 points. On the walk and turn test, they scored him 0 points. On the one leg stand test, they scored him 1 point. From a trial standpoint, HGN would not be admissible unless corroborated by one of the physical tests. That did not occur here.

The evidentiary test here was obtained as the result of an investigatory detention that exceeded the scope allowed by Idaho law. Once Hunter passed the field sobriety tests the officers should have let him go. See State v. Jones, 115 Idaho 1029, 1033, 772 P.2d 236, 240 (Ct.App.1989) (The request to perform field sobriety tests was a reasonable attempt by the

officer to obtain information **confirming or dispelling** the officer's suspicions that the driver was driving while under the influence.); State v. Ferreira, 133 Idaho 474, 988 P.2d 700 (Idaho App. 1999) (Field sobriety tests are the least intrusive means reasonably available to **verify or dispel** the officer's suspicion in a short period of time that a driver is in violation of I.C. § 18-8004.); State v. Wigginton, 142 Idaho 180, 125 P.3d 536 (Idaho App. 2005) (The suspicion of DUI, which initially motivated the traffic stop, was **removed** when Wigginton performed satisfactorily on the sobriety test.); State v. Buell, 175 P.3d 216 (Idaho App. 2008) (Field sobriety tests are a reasonable part of the process to investigate suspected DUI and are the least intrusive means reasonably available in a short timeframe to **confirm or dispel** the officer's suspicion.).

This fact-pattern has never appeared in any of counsel's prior cases. Boise City started using Lifeloc devices early in 2011. This case originates from events on 16 April 2011. In "The Olden Days" counsel suspects a driver with this fact pattern was probably released on the basis of the SFSTs. With the Lifeloc, law enforcement has a tool available on the roadside, rather than having to arrest someone and take them "downtown." However, the existence of such a tool does not allow law enforcement to ignore the results of their own **RELIABLE** tests. In this case the officers required Hunter to blow and the waiting period and programming of the machine consumed another 20-plus minutes of time. That is an unlawful extension of the investigatory stop.

Dated this 31 October 2011.



ERIK O'DANIEL
Deputy Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 31 October 2011, I caused to be hand-delivered to the BOISE CITY ATTORNEY a true and correct copy of the foregoing document.



ERIK O'DANIEL

NOV - 7 2011

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO)	
)	
Plaintiff,	)	Case No. CR-MD-2011-0005903
)	
v.)	
)	
MARK C. HUNTER	)	STATE'S RESPONSE TO
	)	DEFENDANT'S MEMORANDUM IN
Defendant.	)	SUPPORT OF MOTION TO SUPPRESS
	)	EVIDENCE

The State of Idaho objects to the Defendant's Motion to Suppress because it is untimely under Idaho Criminal Rule 12(d). If the Court does not deny the motion on this ground, the State objects to the motion because the police had reasonable grounds to request the defendant submit to a breath test.

A. Timeliness

The State previously filed an Objection to Motion to Suppress dated October 6, 2011, arguing the Defendant's motion was untimely, and that the Defendant has not offered good cause or excusable neglect for the untimeliness. The State will rely on that brief for its untimeliness

argument.¹

B. Suppression

In the event the Court exercises its discretion to hear the merits of the motion to suppress, the State contends it should be denied because, based on a totality of the circumstances, the police had reasonable grounds to have the Defendant submit to an evidentiary breath test. Pursuant to Idaho Code § 18-8002(1), a driver gives his consent to evidentiary testing, “provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving” under the influence. In addition, Idaho Code § 18-8002(4)(b) states that a hearing officer may withdraw a refusal suspension if he or she finds the officer did not have “legal cause” to request a breath test. These two code sections suggest the standard by which an officer may request an evidentiary breath test is “reasonable grounds to believe” or “legal cause.”

The Idaho Court of Appeals discussed the standard required for an officer to request an evidentiary test, but did not affirmatively decide this issue. *Thompson v. State*, 138 Idaho 512, 515, 65 P.3d 534, 537 (Ct. App. 2003). It noted that whether the standard is akin to “probable cause” is not clear, and suggested that “reasonable suspicion” may suffice. *Id.* In fact, the legislature in 1992 changed the language in 18-8002(4)(b) from “probable cause” to “legal cause” to “allow the appropriate standards to be applied to both the traffic stop and the request [for an evidentiary test].” *Deen v. State*, 131 Idaho 435, 958 P.2d 592 (1998). The *Thompson* court explained:

Our decision in *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct.App.1999), suggests that the lesser standard of reasonable suspicion might suffice, for we there held that officers may administer roadside field sobriety tests on the basis of

¹ See also attached State’s exhibit 1, *State of Idaho v. Shaunna Gullikson*, CR-MD-2009-0008114, a district court decision upholding the denial of a motion to suppress based on untimely filing and addressing whether having a heavy caseload amounts to good cause or excusable neglect under ICR 12(d).

reasonable suspicion. However, the standard required for transporting an individual to a law enforcement building or hospital for breath, urine or blood testing was not at issue in *Ferreira*, and it therefore is not determinative of the “legal cause” standard under § 18-8002(4)(b). The present case, however, is not one that requires resolution of this narrow issue, for even assuming that probable cause sufficient to support an arrest is the correct standard to be applied, we hold that that standard is satisfied here.

Thompson, 138 Idaho at 515, 65 P.3d at 537.

The State contends the standard by which an officer can request an evidentiary breath test on a portable Lifelock breath testing instrument should be the same as or at least analyzed the same as the standard for extending any investigatory detention – reasonable and articulable suspicion. Reasonable suspicion requires “some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). “If the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope of the investigative stop enlarged.” *State v. Johns*, 112 Idaho 873, 877, 736 P.2d 1327, 1331 (1987). “The reasonableness of the suspicion must be evaluated based on the totality of the circumstances at the time of the stop, including the time of the seizure.” *Deen v. State*, 131 Idaho 435, 436, 958 P.2d 592, 593 (1998) (citing *State v. Rawlings*, 121 Idaho 930, 932-33, 829 P.2d 520, 522-23 (1992)).

Probable cause, on the other hand, is a higher standard than reasonable suspicion. “Probable cause for an arrest exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the suspect has committed or is committing an offense.” *Thompson v. State*, 138 Idaho 512, 515, 65 P.3d 534, 537 (Ct. App. 2003) (citing *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 536-37 116 L.Ed.2d 589, 595-96 (1991)). “In determining whether there is probable cause for an arrest, an officer is entitled to draw

reasonable inferences from the available information in light of the knowledge that he has gained from his previous experience and training.” *Thompson v. State*, 138 Idaho 512, 515, 65 P.3d 534, 537 (Ct. App. 2003) (citations omitted).

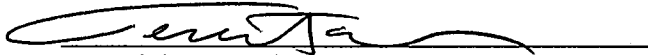
In this case it is anticipated the State’s witnesses will testify at the suppression hearing, among other things, that the Defendant was driving after dark without headlights at around midnight, smelled of alcohol, admitted to drinking three cocktails, admitted to being at a mixed martial arts fighting event, had bloodshot and glassy eyes, did not have any recent head injuries or eye problems, and scored a maximum six points on the horizontal gaze nystagmus (HGN) test. It is anticipated the officer will testify based on his training and experience the HGN test is the most reliable of the three field sobriety tests in providing evidence of impairment.

Based on a totality of the circumstances, the State contends that regardless of which standard the Court uses, the officer was well within his duty to administer the Lifelock to the Defendant. The odor of alcohol and admissions, along with the failed HGN test, and other surrounding circumstances, provided the officer with reasonable suspicion or “reasonable belief” that the defendant was driving under the influence. This allowed him to extend the time and scope of his detention at least long enough to obtain a breath sample to confirm whether the defendant was safe to drive. This extension was reasonable in light of the circumstances, especially because the officer had a portable breath testing device and did not have to take the defendant to the jail. The State further contends that the totality of the circumstances were sufficient to provide the officer with probable cause as well.

Finally, public policy supports the officer’s decision to administer a breath test in this case. To let the Defendant go simply because he passed the two field sobriety tests that can be controlled to a certain extent depending on the coordination and physical aptitude of the

Defendant would have been poor judgment by the officer and would have potentially put the community in danger in light of the surrounding circumstances. The State requests the Court deny the Motion to Suppress.

DATED this 7 day of November, 2011.

A handwritten signature in black ink, appearing to read 'Jeremiah R. Taylor', is written over a horizontal line.

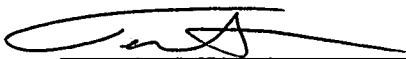
Jeremiah R. Taylor
Assistant City Attorney

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on this 7 day of November, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

ERIK J O'DANIEL
ADA COUNTY PUBLIC DEFENDER
200 W FRONT STREET ROOM 1107
BOISE ID 83702

☐ US MAIL
☐ INTERDEPARTMENTAL MAIL
☐ FACSIMILE
☒ HAND DELIVER



NO. *Sticklen jll*
 RECEIVED
 NOV 03 2010
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 J. DAVID MARRAS, Clerk
 CITY OF BOISE
 LEGAL DEPARTMENT
 DEPUTY
COPY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,)	
	)	Case No. CR-MD-2009-8114
Plaintiff/Respondent,)	
vs.)	
)	
SHAUNNA GULLIKSON,	)	MEMORANDUM DECISION
	)	AND ORDER
Defendant/Appellant)	

This case before the court on Defendant Shaunna Gullickson's (Gullickson's) appeal from an order of the Magistrate Hon. Theresa Gardunia, denying a motion to suppress as untimely. For the reasons that follow the order will be affirmed.

FACTS AND PROCEDURAL HISTORY

Gullickson was charged with possession of a controlled substance and possession of drug paraphernalia on April 23, 2009. She entered a not guilty plea to the misdemeanor on May 13, 2009. On August 17, 2009, a motion to suppress was filed by Gullickson. There was no memorandum filed in support of this motion, as is required by the local rules of this Court. The motion stated that "[a] Memorandum in Support of the Motion to Suppress [will] be shortly forthcoming." The memorandum was filed on October 13, 2009, a few days before the October 19, 2009 scheduled hearing on the motion.

EXHIBIT
 1
 00005

1 At the hearing, the State objected to the motion to suppress as untimely. After considering
2 the explanations presented by Gullickson for the late-filed motion, the magistrate found that
3 sufficient cause had not been advanced to excuse the tardiness of the motion and it was denied as
4 untimely. Gullickson subsequently pled guilty to both charges, preserving the right to appeal the
5 magistrate's denial of the motion to suppress.
6

7 STANDARD OF REVIEW

8 When a district judge considers an appeal from a magistrate judge, the district judge is acting
9 as an appellate court, not as a trial court. *State v. Kenner*, 121 Idaho 594, 826 P.2d 1306, 1308
10 (1992).
11

12 I.C.R. 12(d) and 12(f) set the standard for review on the issue of timeliness as an abuse of
13 discretion. When the trial court's exercise of discretion is reviewed on appeal it is examined to
14 determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2)
15 whether the lower court acted within the boundaries of such discretion and consistent with any legal
16 standards applicable to the specific choices before it; and (3) whether the lower court reached its
17 decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333
18 (1989).
19

20 ANALYSIS

21 Gullickson contends that the magistrate erred in denying her motion to suppress on grounds
22 of untimeliness because "[t]here was no understanding or requirement that a subsequent memo in
23 support of the motion would be forthcoming." She also asserts that "[i]t is clear that the court
24 abused its discretion in this case by not even hearing the motion to suppress. There must be abuse
25

1 when a hearing is scheduled with the approval of the court and state's counsel knowing full well a
2 motion was filed the day before, then denying to even hear the motion on that date scheduled." *Id.*

3 Gullickson is incorrect in contending that there was no understanding or requirement
4 concerning the filing of a separate memorandum in support of the motion to suppress. As previously
5 noted, Gullickson specifically stated in the motion to suppress, "[a] Memorandum in Support of the
6 Motion to Suppress [will] be shortly forthcoming." Moreover, the local rules of this court require
7 that a memorandum accompany the motion. Fourth District Court provides: Local Rule 8. Civil and
8 Criminal Motion Practice. 8.1 Motions. Unless ordered otherwise by the court, each motion and
9 response to such motion, other than a routine or uncontested matter, must be accompanied by a
10 separate memorandum, not to exceed twenty-five (25) pages, containing all of the reasons and
11 points and authorities relied upon by the moving party."
12

13 Finally, Gullickson's two page motion to suppress, with a single paragraph of argument,
14 would not have satisfied the requirement that a party raising an issue must fully argue the issue in a
15 brief or it is considered abandoned. *See, e.g., Bach v. Bagley*, 148 Idaho 784, 229 P.3d 1146, 1152-
16 53 (2010) ("Where an appellant fails to assert his assignments of error and to support his position
17 with sufficient authority, those assignments of error are too indefinite to be heard by the Court.)
18 *State v. Zichko*, 129 Idaho 259, 923 P.2d 966, 970 (1996) (party waives issue on appeal if authority
19 or argument is lacking).
20

21 Idaho Criminal Rule 12(d) states:

22 Motion date. Motions pursuant to Rule 12(b) must be filed within twenty-eight
23 (28) days after the entry of a plea of not guilty or seven (7) days before trial
24 whichever is earlier. In felony cases, such motions must be brought on for hearing
25 within fourteen (14) days after filing or forty-eight (48) hours before trial,
26 whichever is earlier. The court in its discretion may shorten or enlarge the time

provided herein, and for good cause shown, or for excusable neglect, may relieve a party of failure to comply with this rule.

Gullickson entered her not guilty plea on May 13, 2009. The motion to suppress was filed on August 17, 2009 which, as noted by the State during the hearing, was more than ninety (90) days after the entry of the plea and not within twenty-eight (28) days after the entry of the plea, as required by the rule. The memorandum, which was required to be filed with the motion to suppress, was not filed until more than fifty (50) days after the motion itself was filed and nearly 6 months after the entry of Gullickson's not guilty plea.

Gullickson attempts to assert that the State and the court acquiesced in her untimely motion because the hearing on the motion was set for October 19, 2009 and she was not aware that there was going to be an untimeliness issue raised until then. First, this argument was not asserted before the magistrate, therefore the magistrate had no opportunity to address it and, consequently, neither will this court. *See Henderson v. Smith*, 128 Idaho 444, 915 P.2d 6, 13 (1996) ("... the issue was not ... argued before or addressed by the magistrate. Smith asserted this issue for the first time on appeal to the district court. This Court will not consider issues that are raised for the first time on appeal.").

Second, the State and the court have no obligation to inform Gullickson, when a hearing is set, that timeliness issues will be raised. The plain wording of I.C.R. 12(d) provides clear notice of the timeliness issue, though there is an obligation for the state to raise an objection prior to arguing the merits of the motion. *See State v. Carey*, 122 Idaho 382, 834 P.2d 899, 901 (Ct. App. 1992) ("[T]he prosecutor in the present case acquiesced in Gullickson's delayed filing of the motion by not

1 objecting to the motion and by proceeding with argument . . ."). Here the State objected to the
2 untimeliness at the outset.

3 During the hearing, Gullickson's attorney argued that the untimeliness should be excused
4 because of the caseload. The magistrate noted that

5 [t]his wasn't a matter of a few days went by and the suppression issue wasn't
6 filed. The matter was cited in April. You entered a plea of not guilty in May.
7 Discovery in this case was turned over by the State in June. The first pre-trial
8 conference happened in July and it wasn't until August 17th, 2009 that a
9 suppression motion was filed. And I give the State some credence with respect to
10 there was a violation of a local rule here and that is if you file a motion to
11 suppress, if you file a motion, you have to provide a memorandum to the Court in
12 conjunction with that motion and that wasn't done in this case until October 13th.
13 The busyness of the Court is never going to change. But the mere busyness of the
14 Court or of any individual office is not a reason to eviscerate the rules in this case.
15 There are rules, the parties rely on those rules. The Court relies on those rules.
16 And because this rule was violated, I'm going to grant the State's motion, deem
17 that the motion to suppress was untimely and that will be the end of the matter.

18 The Court cannot find that the magistrate abused her discretion in denying Gullickson's
19 motion to suppress. The motion was filed very late and was not accompanied by the mandatory
20 supporting memorandum. This was not filed until a few days prior to the hearing. No extensions of
21 time were requested.¹ Gullickson's assertion that this very late filing should be excused because of
22 counsel's caseload is also unavailing. *See State v. Cutler*, 143 Idaho 297, 141 P.3d 1166, 1169 (Ct.
23 App. 2006) (noting district court's determination that the mere assertion of a heavy caseload was
24 insufficient to excuse the untimeliness of a motion to suppress). In *State v. Dice*, 126 Idaho 595, 887
25 P.2d 1102 (Ct. App. 1994), the Idaho Court of Appeals reversed an order granting a motion to
26 suppress in part on grounds that the motion was not timely. The Court said:

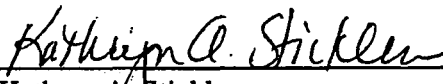
1 It appears that the district court decided to hear the motion because it felt the
2 motion was meritorious. This, we conclude, was error. Idaho Criminal Rule
3 12(d) clearly requires either good cause or excusable neglect to be shown by a
4 party who has missed the prescribed deadlines. Allowing untimely motions to be
5 heard because they appear meritorious eviscerates the purpose of the rule. 126
6 Idaho at 597.

7 CONCLUSION

8 The magistrate's decision was within her discretion, and was based on an exercise of reason.
9 Accordingly, in view of the foregoing, the decision of the magistrate is hereby affirmed.

10 IT IS SO ORDERED.

11 DATED THIS 29th day of October, 2010.

12
13 
14 Kathryn A. Sticklen
15 District Judge
16
17
18
19
20
21
22
23

24 ¹ The magistrate also noted that the caseload excuse could be used in every case with the Public Defender's Office "[b]ut
25 there is a motion to extend time," which was not utilized in this case. Transcript of Proceedings, at 8.

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 49(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

BOISE CITY PROSECUTING ATTORNEY
VIA: INTERDEPARTMENTAL MAIL

ADA COUNTY PUBLIC DEFENDER
VIA: INTERDEPARTMENTAL MAIL

HON. MAGISTRATE GARDUNIA
VIA: INTERDEPARTMENTAL MAIL

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 11/2/10

By 

Deputy Clerk

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB: 2/11/1983

Scheduled Event: Motion to Suppress Monday, November 07, 2011 03:30 PM

Judge: Kevin Swain

Clerk:

Nicky Emery

Interpreter:

Prosecuting Agency: AC ☒ BC EA GC MC

Pros:

Yenny Taylor

(PD)

Attorney:

Eric O'Daniel

• 1118-8004 M2 Driving Under the Influence-(Second Offense) M

34105

Case Called

Defendant:

☒

Present

☐

Not Present

☐

In Custody

☐ Advised of Rights☐

Waived Rights

☐

PD Appointed

☐

Waived Attorney

☐ Guilty Plea / PV Admit☐

N/G Plea

☐

Advise Subsequent Penalty

☐ Bond \$☐☐

ROR

☐

Pay / Stay

☐

Payment Agreement

☐ In Chambers☐

PT Memo

☐

Written Guilty Plea

☐

No Contact Order

#1 *ue timely motion / brief*#2 *ue timely / argument*Court - Grant motion *ue time* / Comments re motion
warrantless *Stip - Exhibit 1 - Police Report*
12-7-2011 @ 9:30 Decision *to be filed*Court Parties to submit Exhibit
of any further briefs / Case Law#1 calls *sw #1 - officer Robert Gibson* / #1 *dx sw #1 -*#2 *ex sw #1 -*#1 *dx sw #1 -*

Finish () Release Defendant

#2 *ex sw #1*Court *sw #1 - excused*

35907

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

200 W. Front Street, Boise, Idaho 83702

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

Case No: CR-MD-2011-0005903

NOTICE OF HEARING NO.

A.M.

FILED
P.M.

4:06

NOV - 7 2011

CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Hearing Scheduled...Wednesday, December 07, 2011...09:30 AM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows:

Defendant: Mailed ☒ Hand Delivered _____ Signature _____
Clerk me Date 11-7-11 Phone () _____

Erik O Daniel
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed ☒ Hand Delivered _____ Signature _____
Clerk me Date 11-7-11 Phone () _____

Prosecutor: Interdepartmental Mail ☒ ☐ Ada ☐ Boise ☐ Eagle ☐ G.C. ☐ Meridian
Clerk me Date 11-7-11

Public Defender: Interdepartmental Mail _____
Clerk _____ Date _____

Other: _____

Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Dated: 11/7/2011

CHRISTOPHER D. RICH
Clerk of the Court

By: Vicky Emery
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

MARK HUNTER

Defendant,

Case No. CR-MD-2011-0005903

DECISION AND ORDER

NO. 843 FILED
A.M. 8:43 P.M.

DEC 06 2011

CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

FACTS

This is a motion to suppress the results of the defendant's breath test. The parties have stipulated to the pertinent facts which are as follows: On April 16th 2011 at three minutes after midnight the defendant was stopped at eighth and Myrtle for driving without headlights. There was the odor of alcohol and the defendant admitted drinking three vodka tonics between 7:30 and 10:30. Officer Robert Gibson responded and conducted three field sobriety tests. The defendant failed the horizontal gaze nystagmus test, but passed the one leg stand and the walk and turn tests. The defendant was then arrested and submitted to a breath test which resulted in readings of .090 and .088.

ISSUE

The defense argues the breath test was the result of an impermissibly extended detention, and that the defendant should have been released once he passed the walk and

turn and the one leg stand tests. The court frames the issue somewhat differently. It is clear the breath test was obtained after the defendant's arrest. The investigative detention had ended at that point. If the arrest was supported by probable cause the breath test is admissible. If the arrest was not supported by probable cause the breath test is a product of an illegal arrest and must be suppressed.

ANALYSIS

Officer Gibson relied on three factors in deciding to arrest the defendant for driving under the influence: driving without headlights, admitted consumption of alcohol earlier that evening, and the result of the horizontal gaze nystagmus (HGN) test. While driving without headlights is a valid reason for a stop, it is not a compelling indicator of impairment by alcohol. The defendant corroborated the officer's observation of an odor of alcohol by admitting consumption earlier in the evening. However the amount admitted to over the time frame indicated would not lead directly to a conclusion the defendant was impaired at the time of the stop.

It is clear Officer Gibson relied heavily on the defendant's failure of the HGN test in making his decision to arrest. Officer Gibson testified he places more importance on that test because the subject cannot practice for the test. This does not comport with the applicable law concerning the reliability of the HGN test.

The HGN test is a reliable indicator of impairment only if corroborated by other field sobriety tests. "Although we note that in conjunction with other field sobriety tests, a positive HGN test result does supply probable cause for an arrest, standing alone that

result does not provide proof positive of DUI, because many other factors may cause nystagmus. *State v. Garrett*, 119 Idaho 878, 881(S.Ct 1991). Although *Garrett* addresses evidentiary admissibility, the issue is the same – the reliability of the HGN test.

Here the other field sobriety tests not only failed to corroborate the HGN test, they completely contradicted it. The defendant demonstrated virtually no impairment when performing the one leg stand and no impairment at all when performing the walk and turn test. The results of those tests rendered the HGN test unreliable as a matter of law. The remaining factors considered by the officer, even taken together, fail to rise to the level of probable cause to support an arrest.

As the defendant's arrest was not supported by probable cause, and the breath test is a product of that arrest, the defendant's motion to suppress the breath test is hereby,

GRANTED.

Dated this 6th day of December, 2011

A handwritten signature in black ink, appearing to read 'Kevin Swain', written over a horizontal line.

Kevin Swain – Magistrate Judge

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO

Plaintiff,

v.

MARK C HUNTER


Defendant.

Case No. CR-MD-2011-0005903

**STIPULATED ADMISSION OF
POLICE REPORTS**


The State of Idaho, by and through Assistant City Prosecutor Jeremiah Taylor, and the Defendant, by and through his attorney Erik O'Daniel, hereby submit the attached police reports, marked as exhibit 1 for purposes of identification, and stipulate that the Court may consider the contents in reaching its decision regarding the Defendant's Motion to Suppress. The only stipulated change to the police reports is that the Defendant admitted consuming a total of three Vodka tonics and/or cocktails instead of four.

DATED this 22 day of November, 2011.



Jeremiah R. Taylor
Assistant City Attorney

DATED this 28 day of November, 2011.



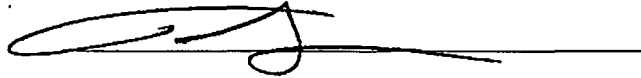
Erik O'Daniel
Ada County Public Defender

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on this 22 day of November, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

ERIK J O'DANIEL
ADA COUNTY PUBLIC DEFENDER
200 W FRONT STREET ROOM 1107
BOISE ID 83702

☐ US MAIL
☐ INTERDEPARTMENTAL MAIL
☐ FACSIMILE
☐ HAND DELIVER
☒ EMAIL

A handwritten signature in black ink, consisting of a stylized 'J' or 'L' shape followed by a horizontal line.

Supplemental Reports

☒ DUI
☐ Domestic Violence
☐ Property Invoice
☐ Missing/Runaway
☐ Case Status
☐ Signature Form
☐ Witness Statement
☐ Vehicle Disposition
☒ Probable Cause/Suppl
☐ CSI

Boise Police Department

Driving Under Influence

Approved on 4/24/2011 1:22:00 AM

General Report Type

☒ Initial Report ☐ Supplemental

Page 1

RD: 9 DR# 2011 - 108828

Charges	
Date & Time Occurred 4/16/2011 0003 to 4/16/2011 0003	Date & Time Reported 4/16/2011 0003
Location of Occurrence Myrtle/ 8th Boise	
Chrg# 1	Offense/Charge DUI- 2nd
LawSection ISC 18-8005(4)	# Courts 1
<input type="checkbox"/> Mental Hold <input type="checkbox"/> Felony <input checked="" type="checkbox"/> Misdemeanor <input type="checkbox"/> Infraction	

People Involved

Suspect Hunter, Mark Christopher Race: W Sex: M DOB: 02/11/1983 Age: 28
 911 Brook Trout Ln 5' 7" 155 lbs Hair Color: BRO Eye Color: BLU
 Address: Meridian, ID 83642
 Occupation: Res Phone: SSN: [REDACTED]
 Bus or School: Cell Phone: OLN/ST: [REDACTED]
 Bus Phone: How Ident: DL

Vehicle Info: 01 LEX IS3 4DR YELLOW 1AJK144 ID

Charges Info: ☒ #1 ☐ #2 ☐ #3 ☐ #4 ☐ #5 ☐ #6 ☐ #7 ☐ #8 ☐ #9 ☐ #10
☒ Arrest ☐ Cited Summons: 1479588

Victim State of Idaho, Race: Sex: DOB: Age: -
 Address: , ID lbs Hair Color: Eye Color:
 Occupation: Res Phone:
 Bus or School: Cell Phone: OLN/ST: /
 Bus Phone: How Ident:

SUSPECT VEHICLE:

Probable Cause
Officer Lacow stopped a yellow Lexus for driving without its headlights. The driver was identified as Mark Hunter by his Idaho driver's [REDACTED] Officer Lacow stated he could smell the odor of an alcoholic beverage coming from the vehicle, and Mark admitted to drinking. I conducted the DUI investigation. After Mark failed the HGN test, I placed him under arrest for DUI. After the 15 minute waiting, Mark blew .090/.088. Mark was charged with DUI- 2nd. Mark was convicted of DUI on 3/21/08. See supplement

☒ Supplement Dictated

Stolen Property				
108 Description	Property Value			
<table border="1"> <tr> <td> Admin Officer(s) Reporting R Gibson Ada No. 747 Supervisor Review B Quilter 440 </td> <td> <input type="checkbox"/> Phone Rpt <input type="checkbox"/> Counter Rpt <input checked="" type="checkbox"/> Audio Recording <input type="checkbox"/> Video Recording <input checked="" type="checkbox"/> Cuffs Check <input checked="" type="checkbox"/> Seat Belled Division: Patrol </td> <td> Routed to: </td> </tr> </table>		Admin Officer(s) Reporting R Gibson Ada No. 747 Supervisor Review B Quilter 440	<input type="checkbox"/> Phone Rpt <input type="checkbox"/> Counter Rpt <input checked="" type="checkbox"/> Audio Recording <input type="checkbox"/> Video Recording <input checked="" type="checkbox"/> Cuffs Check <input checked="" type="checkbox"/> Seat Belled Division: Patrol	Routed to:
Admin Officer(s) Reporting R Gibson Ada No. 747 Supervisor Review B Quilter 440	<input type="checkbox"/> Phone Rpt <input type="checkbox"/> Counter Rpt <input checked="" type="checkbox"/> Audio Recording <input type="checkbox"/> Video Recording <input checked="" type="checkbox"/> Cuffs Check <input checked="" type="checkbox"/> Seat Belled Division: Patrol	Routed to:		
Copies for: <input checked="" type="checkbox"/> City Prosecutors <input type="checkbox"/> County Prosecutors <input type="checkbox"/> Domestic Violence				

Original - Records

EXHIBIT 1 000066

GENERAL REPORT
Continuation Page

Boise Police Department

Page 2

RD 9 DR# 2011 - 108828

6 Date & Time Occurred 4/16/2011 7 Date & Time Reported 4/16/2011 8 Location of Occurrence Myrtle/ 8th Boise

3 Charges - Continued from Face Page

3 Officers Involved

Related DRs

Alt

Audio

Video

Comment

766 Lacow, Jeremy D

☐☐

3 People Involved - Continued from Face Page

Person

Pereira, Carrie Leigh

Race: U

Sex: F

DOB: [REDACTED]

Age: 27

With

911 Brook Trout Ln

"

lbs

Hair Color:

Eye Color:

Knowledge

Meridian, ID 83642

Occupation:

Res Phone:

SSN:

Bus or School:

Cell Phone:

OLN/ST: [REDACTED]

Bus Phone:

How Ident: DL

Further Desc: passenger

3 Admin

Officer(s) Reporting

Adallo

R Gibson

747

Original - Records

000067

**Narrative Report
Supplement**

Boise Police Department
Report Type: Driving Under Influence
Approved on 4/24/2011 1:23:00 AM

DR# 2011 - 108828

Chgs# Offense/Charge 1 DUI- 2nd	Date of This Narrative 4/18/2011
	Date & Time Occurred 4/16/2011 0003
4 Location of Occurrence Myrtle/ 8th Boise	<input type="checkbox"/> Audio Related to this Supplement

NARRATIVE

INITIAL RESPONSE/CONTACT:

On 4/16/11 at 0003 hours, Officer Lacow stopped a vehicle for driving without headlights at Myrtle and 8th. Officer Lacow requested a STEP assist and I responded for the STEP assist.

Officer Lacow identified the driver as Mark Hunter by his Idaho driver's license. Officer Lacow stated that he observed the vehicle come from the parking garage at 9th and Front without headlights. Officer Lacow stated that the vehicle continued southbound on 9th and turned eastbound on Myrtle still without lights. Officer Lacow stated he stopped the vehicle at Myrtle and 8th. The passenger was identified as Carrie Pereira.

Officer Lacow stated that he could smell the odor of an alcoholic beverage coming from the vehicle and Mark admitted to drinking. Officer Lacow stated he checked Mark's eyes for nystagmus while Mark seated in the driver's seat. Officer Lacow stated he did observe nystagmus in Mark's eyes.

I had Mark step out of the vehicle to conduct standardized field sobriety tests on the sidewalk. Mark stated he was coming from Fatty's and was on his way home. Mark stated that he was at Qwest Arena for the MMA fights earlier that night. Mark stated he consumed four Vodka tonics that night. Mark stated that he had the beverages between 1930 and 2230 hours. While speaking to Mark, I could smell the odor of an alcoholic beverage coming from his person. I noticed that Mark's eyes were glassy and bloodshot. Mark stated that he was not taking any medications and did not have any physical impairments. Mark stated he did not have any recent head injuries or eye problems.

I conducted the horizontal gaze nystagmus test. Both of Mark's eyes did not pursue smoothly, had distinct and sustained nystagmus at maximum deviation and nystagmus onset before 45 degrees.

I asked Mark if he was comfortable with the shoes he was wearing. Mark stated that he was. I instructed and demonstrated the walk and turn test. Mark did not score any errors on the test.

I instructed and demonstrated the one leg stand test. Mark swayed during the test.

I checked Mark's eyes a second time and he had the same scoring errors as the first time.

I advised Mark that I was requiring him to give me a breath sample. I placed Mark in handcuffs. I placed Mark in the back of my vehicle. While Mark was in the back of my vehicle, I checked his mouth for any foreign substances and did not find any. I advised Mark not to burp, belch, or vomit for the fifteen minute waiting period. I played the ALS audio recording. After the fifteen minute waiting period, I had Mark blow into the Lifeloc instrument. Mark blew .080/.088. Mark was advised of his results.

The vehicle belonged to the passenger, Carrie. Carrie had been drinking and requested that the vehicle be parked and secured at the scene which Officer Lacow did. The keys were given to Carrie and she was released.

I transported Mark to the Ada County Jail. Mark was charged with DUI- 2nd. Mark was convicted of a DUI on 3/21/08.

Admin				
R Gibson	Patrol	747	B Quilter	440
REPORTING OFFICER		ADA #	APPROVED BY	ADA #

**Narrative Report
Supplement**

Boise Police Department
Report Type: Driving Under Influence
Approved on 4/24/2011 1:23:00 AM

DR# 2011 - 108828

Chq# Offense/Charge 1 DUI- 2nd	Date of This Narrative 4/18/2011
	Date & Time Occurred 4/16/2011 0003
4 Location of Occurrence Myrtle/ 8th Boise	<input type="checkbox"/> Audio Related to this Supplement

ATTACHMENTS:

1. Probable Cause Affidavit
2. DUI supplement
3. ALS supplement
4. Lifeloc printout
5. Mark's driver's license
6. Mark's driving record

CONCLUSION:

Route to City Prosecutor.

/jc

Admin	Patrol	747	B Quilter	440
R Gibson				
REPORTING OFFICER		ADA #	APPROVED BY	ADA #

D.U.I. GENERAL REPORT

☐ ADA COUNTY SHERIFF'S DEPARTMENT

☒ BOISE POLICE DEPARTMENT

RD

9

DR No.

108-828

OFFENSE DRIVING UNDER THE INFLUENCE	LAW SECTION I.S.C 18-8004	<input type="checkbox"/> FELONY <input checked="" type="checkbox"/> MISDEMEANOR <input type="checkbox"/> ACCIDENT INVOLVED
---	-------------------------------------	---

<input type="checkbox"/> COMMERCIAL VEHICLE 18-8004(1)(b)	<input type="checkbox"/> UNDER 21 YEARS 18-8004(1)(d)	<input checked="" type="checkbox"/> ENHANCED PENALTY CHARGE 18-8004C AND (1)(a)	<input type="checkbox"/> AGG. DUI 18-8006
---	---	---	---

VICTIM NAME- STATE OF IDAHO	DATE OCCURRED 4/16/11	TIME OCCURRED 0003	LOCATION OF OCCURRENCE MYRTLE 18TH
-----------------------------	--------------------------	-----------------------	---------------------------------------

CODES: V = Victim W = Witness RP = Reporting Party PG = Parent/Guardian PSR = Passenger

CODE	NAME - Last, First, Middle	RESIDENCE ADDRESS	RES. PHONE
OCCUPATION		BUSINESS ADDRESS	BUS. PHONE
CODE	NAME - Last, First, Middle	RESIDENCE ADDRESS	RES. PHONE
OCCUPATION		BUSINESS ADDRESS	BUS. PHONE
CODE	NAME - Last, First, Middle	RESIDENCE ADDRESS	RES. PHONE
OCCUPATION		BUSINESS ADDRESS	BUS. PHONE

SUSPECT	NAME - Last, First, Middle HUNTER, MARK CHRISTOPHER	RACE W	SEX M	DOB 2/1/83	AGE 28	HT 507	WT 155	HAIR BLK	EYES BLU
SUSPECT'S ADDRESS 911 BROOK TRAIL MERIDIAN									
CLOTHING AND FOOTWEAR DESCRIPTION WHI T-SHIRT, BLU JEANS, WHI SHOES									
ADDITIONAL SUSPECT INFORMATION - Glasses, tattoos, Teeth, Birthmarks, Jewelry, Scars, Weapons, Etc.									NICKNAME/AKA
ADDITIONAL CHARGES / RELATED DR #s									
ADDITIONAL SUPPLEMENTS <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO									
DL OR SSN YB305812D					<input type="checkbox"/> CITED <input checked="" type="checkbox"/> ARRESTED		SUMMONS NO 1479588		

SUSPECT VEHICLE	YEAR 01	MAKE LEX	MODEL IS3	BODY STYLE 4DR	COLOR/COLOR YELL	LICENSE NO 1A5P2144	STATE ID
VEHICLE KEYS: <input type="checkbox"/> JAIL PROPERTY <input type="checkbox"/> VEHICLE <input checked="" type="checkbox"/> PASSENGER R/O							
VEHICLE: <input checked="" type="checkbox"/> LEFT AT SCENE <input type="checkbox"/> RELEASED <input type="checkbox"/> IMPOUNDED BY							

PROBABLE CAUSE	SEE REPORT
-----------------------	------------

PASSENGERS			
FRONT SEAT	NAME PEREIRA, CARLIE L.	ADDRESS 911 BROOK TRAIL MER.	PHONE #
FRONT SEAT	NAME	ADDRESS	PHONE #
REAR SEAT	NAME	ADDRESS	PHONE #
REAR SEAT	NAME	ADDRESS	PHONE #
REAR SEAT	NAME	ADDRESS	PHONE #
REAR SEAT	NAME	ADDRESS	PHONE #

SUSPECT IDENTIFIED BY <input checked="" type="checkbox"/> DRIVERS LIC/STATE ID <input type="checkbox"/> IDAHO STATE ID <input type="checkbox"/> MILITARY ID <input type="checkbox"/> AFIS <input type="checkbox"/> VERBAL <input type="checkbox"/> OTHER					COPIES ROUTED TO:	
TRANSPORTED TO: <input checked="" type="checkbox"/> ADA COUNTY JAIL <input type="checkbox"/> OTHER		HANDCUFFED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	CHECKED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	SEAT BELTED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	DOOR LOCKED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	COPIES FOR:
REPORTING OFFICER(S) GILSON		ADA NO. 747		SUPERVISOR REVIEW <input type="checkbox"/> FILE <input type="checkbox"/> PATROL F/U <input type="checkbox"/> INVEST F/U		<input type="checkbox"/> CRIME ANALYSIS <input checked="" type="checkbox"/> CITY PROS. <input type="checkbox"/> CRIME PREV <input type="checkbox"/> COUNTY PROS. <input type="checkbox"/> PATROL <input type="checkbox"/> INVESTIGATION <input type="checkbox"/> OTHER COPIES

D.U.I. SUPPLEMENT

SUSPECT NAME HUNTER, MARK C

D.O.B. 2/11/83

DR # 108-828

OFFENSE	LAW SECTION	FELONY	MISDEMEANOR	ACCIDENT INVOLVED
DRIVING UNDER THE INFLUENCE	I.S.C. 18-8004	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> COMMERCIAL VEHICLE 18-8004 (1)(b) <input type="checkbox"/> UNDER 21 YRS 18-8004 (1)(d) <input checked="" type="checkbox"/> ENHANCED PENALTY CHARGE 18-8004C and (1)(a) <input type="checkbox"/> AGG. DUI 18-8006				

HORIZONTAL GAZE NYSTAGMUS LEFT RIGHT <input checked="" type="checkbox"/> EYE DOES NOT PURSUE SMOOTHLY <input checked="" type="checkbox"/> DISTINCT NYSTAGMUS AT MAX. DEVIATION <input checked="" type="checkbox"/> NYSTAGMUS ONSET BEFORE 45 DEGREES <input type="checkbox"/> VERTICAL GAZE NYSTAGMUS PRESENT TOTAL POINTS (DECISION POINTS 4 OR MORE) <u>6</u> <input type="checkbox"/> REFUSED TEST <input type="checkbox"/> CANNOT DO TEST	OPTIONAL FIELD TESTS ALPHABET: FINGER TIP TOUCH AND COUNT (1234, 4321) X3: MODIFIED RHOMBERG/BALANCE AND COUNT:	APPEARANCE DEAMEANOR: <input checked="" type="checkbox"/> COOPERATIVE <input type="checkbox"/> MOOD SWINGS <input type="checkbox"/> VULGAR <input type="checkbox"/> THREATENING <input type="checkbox"/> OTHER SPEECH: <input type="checkbox"/> SLOW <input type="checkbox"/> SLURRED <input type="checkbox"/> RAPID <input type="checkbox"/> THICK TONGUED <input type="checkbox"/> OTHER CLOTHING: <input type="checkbox"/> SOILED <input type="checkbox"/> DISARRAY <input type="checkbox"/> OTHER <input checked="" type="checkbox"/> ODOR OF ALCOHOLIC BEVERAGE ON BREATH <input checked="" type="checkbox"/> GLASSY BLOODSHOT EYES <input type="checkbox"/> IMPAIRED MEMORY FOOTWEAR/CLOTHING DESC:
WALK AND TURN <input type="checkbox"/> STARTS TOO SOON <input type="checkbox"/> CANNOT KEEP BALANCE DURING INSTRUCTIONS <input type="checkbox"/> STOPS TOO SOON <input type="checkbox"/> MISSES HEEL TO TOE (over 1/2") <input type="checkbox"/> STEPS OFF THE LINE <input type="checkbox"/> RAISES ARMS (over 6") <input type="checkbox"/> WRONG NUMBER OF STEPS <input type="checkbox"/> IMPROPER TURN TOTAL POINTS (DECISION POINTS 2 OR MORE) (8 POINTS MAXIMUM) <u>0</u> <input type="checkbox"/> REFUSED TEST <input type="checkbox"/> CANNOT DO TEST	BREATH/BLOOD ALCOHOL CONTENT <input checked="" type="checkbox"/> BREATH RESULTS <u>.090/.108</u> <input type="checkbox"/> BLOOD <input type="checkbox"/> URINE REFUSED TEST <input type="checkbox"/> MOUTH CHECKED? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO 15 MINUTE WAIT? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	DRUGS DRUGS SUSPECTED: <u>No</u> WHY: EVIDENCE SEIZED:
ONE LEG STAND <input checked="" type="checkbox"/> SWAYS <input type="checkbox"/> RAISES ARMS (over 6") <input type="checkbox"/> HOPS <input type="checkbox"/> PUTS FOOT DOWN TOTAL POINTS (DECISION POINTS 2 OR MORE) (4 POINTS MAXIMUM) <u>1</u> <input type="checkbox"/> REFUSED TEST <input type="checkbox"/> CANNOT DO TEST	ADDITIONAL FIELD NOTES LIGHTING <u>DARK</u> TEMPERATURE <u>45</u> WIND: <u>NONE</u> PRECIPITATION: <u>NONE</u> ROAD CONDITION: <u>DRY</u> FST SURFACE: <u>SIDEWALK - LEVEL</u>	OTHER:

WHERE WERE YOU GOING? <u>HOME</u>	WHERE ARE YOU COMING FROM? <u>FATTY'S</u>
WHERE WERE YOU DRINKING? <u>FATTY'S</u>	WHO WERE YOU DRINKING WITH? <u>FRIENDS</u>
WHAT WERE YOU DRINKING? <u>VODKA/TONIC</u>	HOW MUCH DID YOU DRINK? <u>4</u>
TIME STARTED: <u>1930</u>	TIME STOPPED: <u>2230</u>
DO YOU HAVE ANY PHYSICAL IMPAIRMENTS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IF SO, WHAT?
ARE YOU TAKING MEDICATION OF ANY KIND? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IF SO, WHAT? LAST DOSE:
NOTES:	
CASE STATUS REPORT	
<input type="checkbox"/> 1) cleared by arrest <input checked="" type="checkbox"/> 2) cleared by exception <input type="checkbox"/> 3) unfounded <input type="checkbox"/> 4) file only / inactive <input type="checkbox"/> 5) information	

**Narrative Report
Supplement****Boise Police Department
Report Type: Driving Under Influence**

DR# 2011 - 108828

Approved on 4/30/2011 6:03:00 AM

Chg# Offense/Charge 1 DUI- 2nd	Date of This Narrative 4/16/2011
	Date & Time Occurred 4/16/2011 0003
4 Location of Occurrence Myrtle/ 8th Boise	<input type="checkbox"/> Audio Related to this Supplement

Supplement People Involved

Person With Knowledge
Perelra, Carrie Leigh
911 Brook Trout Wy
Address: Meridian, ID 83642

Occupation:
Bus or School:

Race: W Sex: F DOB: 03/17/1984 Age: 27

" lbs Hair Color: Eye Color:

Res Phone: N/A

SSN:

Cell Phone:

OLN/ST:

Bus Phone:

How Ident:

NARRATIVE**INITIAL RESPONSE/CONTACT:**

On 04/16/2011 at 0003 hours, I was on routine patrol traveling southbound on 9th Street, approaching the intersection with Front. I observed a yellow passenger vehicle exiting the parking garage on the southeast corner of 9th and Idaho. The vehicle left the parking garage and did not have any headlights or taillights activated as it turned southbound onto 9th. When I caught up to the vehicle, it was making a left hand turn to proceed eastbound onto Myrtle. The vehicle had still not activated its lights at this point and I initiated a traffic stop at 8th Street and Myrtle.

I approached the driver and identified myself and advised of the reason for the stop. The driver, identified as Mark Hunter, provided an Idaho license and stated that the vehicle belonged to his passenger. Hunter told me that he was driving the vehicle for his passenger, Carrie Pereira and he did not realize that the lights were not self activating.

While speaking with Hunter I could smell the odor of an alcoholic beverage coming from the open driver's side window of the vehicle. I also observed that Hunter's eyes were bloodshot and glassy. I asked Hunter if he had consumed any alcohol and he stated he had a couple of beers earlier in the night. I conducted a preliminary nystagmus test on Hunter who was seated in his vehicle and observed nystagmus. I then requested a STEP unit to be en route and was later assisted by Officer Gibson.

INVOLVED PERSONS:

N/A

VICTIM INTERVIEW:

N/A

SUSPECT INTERVIEW:

N/A

WITNESS INTERVIEW:

N/A

INJURIES (VICTIM & SUSPECT):

Admin			
J Lacow	Patrol	766	T Snyder
REPORTING OFFICER		ADA #	APPROVED BY
			530
			ADA #

Page 3 of 4

000072

**Narrative Report
Supplement**

Boise Police Department
Report Type: Driving Under Influence
Approved on 4/30/2011 6:03:00 AM

DR# 2011 - 108828

Chg# Offense/Charge 1 DUI- 2nd	Date of This Narrative 4/16/2011
	Date & Time Occurred 4/16/2011 0003
4 Location of Occurrence Myrtle/ 8th Boise	<input type="checkbox"/> Audio Related to this Supplement

N/A

DISPOSITION OF PROPERTY/EVIDENCE/WEAPONS:

N/A

CONCLUSION:

Officer Gibson conducted a field sobriety evaluation on Hunter at the scene. Hunter was placed under arrest by Officer Gibson. Passenger Pereira requested that I park her vehicle legally since it had been parked in a handicap spot during the initial contact. I parked her vehicle in a metered spot on 8th, just north of Myrtle at her request and gave her the keys. Pereira, who was also heavily intoxicated, was warned not to drive the vehicle.

See Officer Gibson's supplemental for further information.

/ba

Admin	Patrol	766	T Snyder	530
J Lacow				
REPORTING OFFICER		ADA #	APPROVED BY	ADA #

DEC 07 2011

CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, ADA COUNTY, MAGISTRATE DIVISION

STATE OF IDAHO,

Plaintiff,

vs.

Mack Hunter

Defendant.

Case No. 2011-0005903

PRE-TRIAL MEMORANDUM
AND MINUTE ENTRY

NO. 9:39 FILED
A.M. 9:39 P.M.
☐ In Chambers

DEC 07 2011

CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

Appearances: ☐ AC ☒ BC ☐ EC ☐ GC ☐ MC Prosecutor

Defense Counsel _____ Interpreter _____

☐ Jury trial waived and case is to be re-set for court trial.

☐ Plea and sentence via Defense Counsel authorized by Defendant: Rule 6(d), IMR
and/or IIR.

☐ Pre-trial motions, timely filed, are set for hearing on _____, at
_____ .m.

☒ Case is re-set for PTC 12-16-11 at 8:15 a .m.

☐ Defendant failed to appear. Absence not explained, justified, or excused.
Trial date vacated. Bond forfeited/ROR revoked. Bench Warrant issued.
Bond set at \$ _____.

☒ Other: Mtn to suppress granted

Dated this 7 day of Dec., 2011.

Defendant
Address: _____

Telephone: _____

Clerk: _____

Counsel for Defendant

Deputy Prosecuting Attorney

Magistrate Judge

000074

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB: [REDACTED]

Scheduled Event: Hearing Scheduled Wednesday, December 07, 2011

09:30 AM

Judge: Kevin Swain

Clerk: Michelle [Signature]

Interpreter: _____

Prosecuting Agency: AC BC EA GC MCPros: Katie GarciaPD / Attorney: Erik O'Daniel

• 1118-8004 M2 Driving Under the Influence (Second Offense) M

_____ Case Called Defendant: Present Not Present _____ In Custody

_____ Advised of Rights _____ Waived Rights _____ PD Appointed _____ Waived Attorney

_____ Guilty Plea / PV Admit _____ N/G Plea _____ Advise Subsequent Penalty

_____ Bond \$ _____ ROR _____ Pay / Stay _____ Payment Agreement

In Chambers _____ PT Memo _____ Written Guilty Plea _____ No Contact OrderCourtMotion Suppress GrantedFurther PTC 12-16-2011 @ 8:15

Finish () Release Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

200 W. Front Street, Boise, Idaho 83702

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

Case No: CR-MD-2011-0005903

NOTICE OF HEARING NO.

A.M. 10:04 FILED P.M.

DEC 07 2011

CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

BC Pretrial Conference...Friday, December 16, 2011...08:15 AM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows:

Defendant: Mailed ☒ Hand Delivered _____ Signature _____
Clerk we Date 12-7-2011 Phone () _____

Daniel M Truscott
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed ☒ Hand Delivered _____ Signature _____
Clerk we Date 12-7-11 Phone () _____

Prosecutor: Interdepartmental Mail ☒ ☐ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian
Clerk we Date 12-7-11

Public Defender: Interdepartmental Mail _____
Clerk _____ Date _____

Other: _____

Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Dated: 12/7/2011

CHRISTOPHER D. RICH
Clerk of the Court

By: Vicky Emery
Deputy Clerk

394
PTC
12/16
8:15

NO. _____ FILED _____
A.M. _____ P.M. _____ 230

DEC 12 2011

CHRISTOPHER D. RICH, Clerk
By MAURA OLSON
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

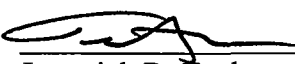
Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO)	
)	
Plaintiff,	)	Case No. CR-MD-2011-0005903
)	
v.)	
)	
MARK C HUNTER	)	MOTION FOR PERMISSION FOR
	)	INTERLOCUTORY APPEAL
)	
Defendant.)	
_____)	

The State of Idaho, by and through Assistant City Attorney Jeremiah Taylor, respectfully requests permission from both the Magistrate Court and District Court to seek an interlocutory appeal pursuant to Idaho Appellate Rule 12. The Magistrate Court's order suppressing evidence of the Defendant's breath alcohol test results prohibits the State from proceeding to trial in this matter. The State contends this case meets the criteria for permission to appeal under IAR 12(a). The State respectfully requests a hearing on this motion if necessary.

DATED this 9 day of December, 2011.




Jeremiah R. Taylor
Assistant City Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9 day of December, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

ERIK J O'DANIEL
ADA COUNTY PUBLIC DEFENDER
200 W FRONT STREET ROOM 1107
BOISE ID 83702

☐ US MAIL
☒ INTERDEPARTMENTAL MAIL
☐ FACSIMILE
☐ HAND DELIVER



~~Interlocutory appeal denied.~~
~~No unique controlling question~~
~~presented.~~
~~State may pursue~~

RECEIVED
DEC 12 2011
ADA COUNTY CLERK

NO. 8:58 FILED
A.M. 8:58 P.M.

DEC 16 2011
CHRISTOPHER D. RICH, Clerk
By VICKY EMERY
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO)

Plaintiff,)

v.)

MARK C HUNTER)

Defendant.)

Case No. CR-MD-2011-0005903

**ORDER GRANTING PERMISSION
FOR INTERLOCUTORY APPEAL**

Having considered the State's Motion for Permission for Interlocutory Appeal, it is
hereby granted.

DATED this 16 day of DEC, 2011.



Judge

JAN 05 2012

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO)

Plaintiff,)

v.)

MARK C HUNTER)

Defendant.)

Case No. CR-MD-2011-0005903

**MOTION FOR PERMISSION FOR
INTERLOCUTORY APPEAL**

The State of Idaho, by and through Assistant City Attorney Jeremiah Taylor, respectfully requests permission from both the Magistrate Court and District Court to seek an interlocutory appeal pursuant to Idaho Appellate Rule 12. The Magistrate Court's order suppressing evidence of the Defendant's breath alcohol test results prohibits the State from proceeding to trial in this matter. The State contends this case meets the criteria for permission to appeal under IAR 12(a). The State respectfully requests a hearing on this motion if necessary.

DATED this 9 day of December, 2011.

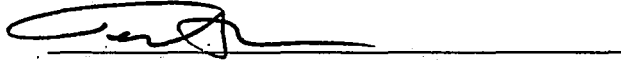

Jeremiah R. Taylor
Assistant City Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9 day of December, 2011, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

ERIK J O'DANIEL
ADA COUNTY PUBLIC DEFENDER
200 W FRONT STREET ROOM 1107
BOISE ID 83702

☐ US MAIL
☒ INTERDEPARTMENTAL MAIL
☐ FACSIMILE
☐ HAND DELIVER

A handwritten signature in black ink, appearing to be "C. J. O'Daniel", is written over a horizontal line.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

200 W. Front Street, Boise, Idaho 83702

JAN 11 2012

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

CHRISTOPHER D. RICH, Clerk
By LISA POSEY
DEPUTY

Case No: CR-MD-2011-0005903

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Hearing Scheduled...Monday, March 05, 2012...09:30 AM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows:

Defendant: Mailed ☒ Hand Delivered _____ Signature _____
Clerk LP Date 1/11 Phone () _____

Daniel M Truscott
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Prosecutor: Interdepartmental Mail ☒ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian
Clerk LP Date 1/11

Public Defender: Interdepartmental Mail ☒
Clerk LP Date 1/11

Other: _____

Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Dated: 12/16/2011

CHRISTOPHER D. RICH
Clerk of the Court

By: Lisa Posey
Deputy Clerk

JAN 18 2012

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO)

Plaintiff,)

v.)

MARK C HUNTER)

Defendant.)

Case No. CR-MD-2011-0005903

**ORDER GRANTING PERMISSION
FOR INTERLOCUTORY APPEAL**

Having considered the State's Motion for Permission for Interlocutory Appeal, it is
hereby granted.

DATED this 13th day of January, 201².

Kathryn A. Stickle
Judge

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB: 2/11/1983

Scheduled Event: Hearing Scheduled Monday, March 05, 2012 09:30 AM

Judge: Kevin Swain

Clerk:

Mickie Emery

Interpreter:

Prosecuting Agency: AC BC EA GC MC

Pros:

Yenny Taylor

PD / Attorney:

Daniel Truscott

• 1118-8004 M2 Driving Under the Influence-(Second Offense) M

 Case Called Defendant: Present Not Present In Custody Advised of Rights Waived Rights PD Appointed Waived Attorney Guilty Plea / PV Admit N/G Plea Advise Subsequent Penalty Bond \$ ROR Pay / Stay Payment Agreement In Chambers PT Memo Written Guilty Plea No Contact Order

Court

Set Over Review

5/29/2012 9:30

Finish () Release Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA **MAR 08 2012**
MAGISTRATE DIVISION

200 W. Front Street, Boise, Idaho 83702

CHRISTOPHER D. RICH, Clerk
By CORRINE PRESLEY
DEPUTY

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

Case No: CR-MD-2011-0005903

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Hearing Scheduled...Tuesday, May 29, 2012...09:30 AM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows:

Defendant: Mailed X Hand Delivered _____ Signature _____
Clerk csp Date 3/8/12 Phone () _____

Daniel M Truscott
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Prosecutor: Interdepartmental Mail X ☐ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian
Clerk csp Date 3/8/12

Public Defender: Interdepartmental Mail X
Clerk csp Date 3/8/12

Other: _____

Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Dated: 3/5/2012

CHRISTOPHER D. RICH
Clerk of the Court

By: Corrine S. Presley
Deputy Clerk

394
HS
5/29
930

NO. _____ FILED _____
A.M. _____ P.M. 354

MAR 27 2012

CHRISTOPHER D. RICH, Clerk
By AMY LANG
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Jeremiah R. Taylor
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7965

RECEIVED IN TRANSCRIPTS
4/6/12

Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)	
)	
Plaintiff/Appellant,	)	Appeal Case No. CR-MD-2011-0005903
)	
vs.)	
)	
MARK C HUNTER,	)	AMENDED NOTICE OF APPEAL
)	
Defendant/Respondent.)	
)	

TO: THE ABOVE-NAMED RESPONDENT, MARK C. HUNTER, BY AND THROUGH
ERIK J. O'DANIEL, ATTORNEY OF RECORD, AND THE CLERK OF THE ABOVE-
ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, the State of Idaho, appeals against the Defendant, Mark C. Hunter, to the District Court of the Fourth Judicial District, from the Interlocutory Order granting the Defendant's Motion to Suppress evidence in Case No. CR-MD-2011-0005903, entered on the December 6, 2011, in the Magistrate's Division of the Fourth Judicial District, State of Idaho, Honorable Judge Kevin Swain presiding.

[Handwritten mark]

2. That the State has the right to appeal to the District Court, and the Judgment described in paragraph 1 above is appealable under and pursuant to Idaho Criminal Rule 54.1.

3. That the appeal is taken upon all matters of fact and law.

4. That the Appellant anticipates raising issues including, but not limited to:

Whether the police officer had probable cause to arrest the Defendant.

5. No portion of the record has been or is requested to be sealed.

6. The State requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, Idaho Appellate Rules:

Stipulated Admission of Police Reports, including the police reports.

7. That the proceedings before the Honorable Judge Kevin Swain on the Motion to Suppress were electronically taped recorded in the Magistrate's Division and said tape recording is in the possession and under the control of the Magistrate's Division of the Fourth Judicial District, County of Ada, State of Idaho.


8. That pursuant to Idaho Criminal Rule 54.6(a), a transcript should be required.

9. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

10. That permission for interlocutory appeal has been granted by both the Magistrate Court and the District Court.

DATED this 27 day of March, 2012.

BOISE CITY ATTORNEY'S OFFICE



Jeremiah R. Taylor
Assistant City Attorney

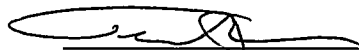
CERTIFICATE OF SERVICE

I hereby certify that I have on this 27 day of March, 2012, served the foregoing document on counsel for the Defendant/Respondent as follows:

ERIK J. O'DANIEL
ADA COUNTY PUBLIC DEFENDER
200 W. FRONT STREET ROOM 1107
BOISE, ID 83702

- ☐ U.S. Mail
- ☒ Personal Delivery
- ☐ Facsimile
- ☐ Other:

Interdepartmental Mail



Jeremiah R. Taylor
Assistant City Attorney

MAR 29 2012

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff/Appellant,

vs.

MARK C. HUNTER,

Defendant/Respondent.

Case No. CR-MD-2011-0005903

ORDER GOVERNING
PROCEDURE ON APPEAL


Notice of Appeal having been filed herein, and it appearing that a transcript of all the testimony of the original trial or hearing is required by Appellant to resolve the issues on appeal:

It is ORDERED:

- 1) That Appellant shall order and pay for the estimated cost of the transcript within 14 days after the filing of the notice of appeal.
- 2) That Appellant's brief shall be filed and served within 35 days of the date of the notice of the filing of the transcript.
- 3) That Respondent's brief shall be filed and served within 28 days after service of appellant's brief.
- 4) That Appellant's reply brief, if any, shall be filed and served within 21 days after service of respondent's brief.

5) That either party may notice the matter for oral argument in writing after all briefs are filed, and that if within fourteen (14) days after the final brief is filed, neither party does so notice for oral argument, the Court may deem oral argument waived and decide the case on the briefs and the record.

Dated this 29th day of March 2012.



KATHRYN A. STICKLEN
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of March 2012 I mailed (served) a true and correct copy of the within instrument to:

BOISE CITY ATTORNEY
VIA: INTERDEPARTMENTAL MAIL

ADA COUNTY PUBLIC DEFENDER
VIA: INTERDEPARTMENTAL MAIL

ADA COUNTY TRANSCRIPTS DEPARTMENT
VIA: INTERDEPARTMENTAL MAIL

CLERK OF DISTRICT COURT
IDAHO STATE
CHRISTOPHER D. RICH
Clerk of the District Court

By: *Matthew Lyke*
Deputy Court Clerk

394
Hr
5/29

NO. _____
A.M. _____ P.M. 3 ³⁰

APR 09 2012

CHRISTOPHER D. RICH, Clerk
By RAE ANN NIXON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)	
)	
Plaintiff/ Appellant,)	
)	
vs.	)	Case No. CRMD-2011-0005903
)	
MARK C. HUNTER,	)	NOTICE OF PREPARATION
	)	OF APPEAL TRANSCRIPT
Defendant/ Respondent,)	
_____)	

A Notice of Appeal was filed in the above-entitled matter on March 28, 2012 and a copy of said Notice was received by the Transcription Department on **April 6, 2012**. I certify the estimated cost of preparation of the appeal transcript to be:

Type of Hearing: Appeal
Date of Hearing: November 7, 2011 Judge: Kevin Swain
22 Pages x \$3.25 = \$71.50

Pursuant to Idaho Rules of Civil Procedure, Rule 83(k)(1), the appellant must, unless otherwise ordered by a District Judge, pay the estimated fee for the preparation of the transcript within fourteen (14) days after the filing of the Notice of Appeal, and the appellant shall pay the balance of the fee, if any, for the transcript upon completion.

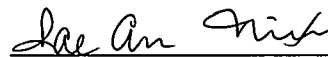
In this case, the Ada Co. Prosecutor has agreed to pay for the cost of the transcript fee upon completion of the transcript.

The Transcription Department will prepare the transcript and file it with the Clerk of the District Court within thirty-five (35) days from the date of this notice. The transcriber may make

MO

application to the District Judge for an extension of time in which to prepare the transcript.

Dated this 9th day of April, 2012.



RAE ANN NIXON

Ada County Transcript Coordinator

CERTIFICATE OF MAILING

I certify that on this 9th day of April, 2012, a true and correct copy of the Notice of Preparation of Appeal Transcript was forwarded to Appellant or Appellant's attorney of record, by first class mail, at:

BOISE CITY ATTORNEY
POST OFFICE BOX 500
BOISE ID 83701-0500
JEREMIAH TAYLOR

ADA CO. PUBLIC DEFENDER
200 W. FRONT ST. STE. 1107
BOISE ID 83702
ERIC O'DANIEL



RAE ANN NIXON

Ada County Transcript Coordinator

394
HS
5/29
9:30

NO. _____ FILED _____
A.M. 11 P.M.

APR 16 2012

CHRISTOPHER D. RICH, Clerk
By RAE ANN NIXON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,)	
)	
Plaintiff/ Appellant,	)	Case No. CRMD-2011-0005903
)	
vs.	)	NOTICE OF LODGING OF
	)	APPEAL TRANSCRIPT
MARK C. HUNTER,)	
)	
Defendant/ Respondent.)	
_____)	


To: Jerry Taylor, Attorney for Respondent.
To: Eric O'Daniel Attorney for Appellant.

PLEASE TAKE NOTICE THAT a transcript of the proceeding in this action was lodged with the Court on **April 16, 2012**.

YOU ARE NOTIFIED that you may pick up a copy of said transcript at the District Clerk's Office, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

Unless objections to the content of the transcript are received within twenty-one (21) days from the date of mailing of this notice, such transcript shall be deemed settled.

Date this 16TH day of April, 2012.



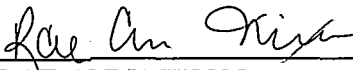
RAE ANN NIXON
Deputy Clerk of the District Court

P

I hereby certify that on this 16th day of April, 2012, a true and correct copy of the Notice of Lodging was sent via US Mail to:

BOISE CITY ATTORNEY
POST OFFICE BOX 500
BOISE ID 83701-0500
JERRY TAYLOR

ADA CO. PUBLIC DEFENDER
200 W. FRONT ST. STE. 1107
BOISE ID 83702
ERIC O'DANIEL



RAE ANN NIXON
Deputy Clerk of the District Court

MAY 07 2012

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff/Appellant,

vs.

MARK C. HUNTER,

Defendant/Respondent.

Case No. CR-MD-2011-0005903

**NOTICE OF FILING
TRANSCRIPT ON APPEAL**

Pursuant to I.R.C.P. 83(p), the transcript of the proceedings dated November 7, 2011, is now filed.

Dated this 7th day of May 2012.

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____

Martha Lyke
Deputy Clerk

my

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of May 2012, I mailed (served) a true and correct copy of the
within instrument to:

BOISE CITY ATTORNEY
VIA: INTERDEPARTMENTAL MAIL

ADA COUNTY PUBLIC DEFENDER
VIA: INTERDEPARTMENTAL MAIL

ADA COUNTY TRANSCRIPTS DEPARTMENT
VIA: INTERDEPARTMENTAL MAIL

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Clerk

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB [REDACTED]

Scheduled Event: Hearing Scheduled Tuesday, May 29, 2012 09:30 AM

Judge: Kevin Swain

Clerk: W. J. [REDACTED]

Interpreter: _____

Prosecuting Agency: AC P BC EA GC MCPros: Katie GarciaPD Attorney: _____

• 1 I18-8004 M2 Driving Under the Influence-(Second Offense) M

_____ Case Called Defendant: _____ Present ☒ Not Present _____ In Custody

_____ Advised of Rights _____ Waived Rights _____ PD Appointed _____ Waived Attorney

_____ Guilty Plea / PV Admit _____ N/G Plea _____ Advise Subsequent Penalty

_____ Bond \$ _____ ROR _____ Pay / Stay _____ Payment Agreement

☒ In Chambers _____ PT Memo _____ Written Guilty Plea _____ No Contact OrderCourtState has filed appealno further action

Finish () Release Defendant

192

IO. _____
A.M. _____ FILED P.M. 12

JUN 11 2012

CHRISTOPHER D. RICH, Clerk
By ELAINE TONG
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Elizabeth Koeckeritz
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7670

Attorney for Plaintiff/Respondent

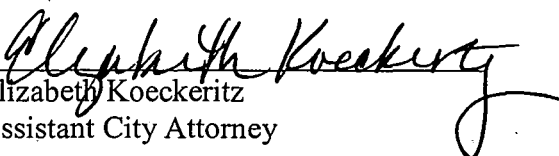
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)	
)	
Plaintiff/Respondent,	)	Appeal Case No. CR-MD-2011-0005903
)	
vs.)	
)	
Mark C. Hunter,	)	MOTION FOR EXTENSION
)	
Defendant/Appellant.)	
_____)	

Respondent, State of Idaho, by and through the undersigned attorney, moves this Court for an order extending the time in which the state's brief will be due until June 19th 2012. This motion is based on the affidavit of the undersigned attorney. Said affidavit is attached hereto and incorporated by reference herein.

DATED this 11 day of June, 2012.

BOISE CITY ATTORNEY'S OFFICE



Elizabeth Koeckeritz
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have on this 11 day of June, 2012, served the foregoing document on counsel for the Defendant/Appellant as follows:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

- ☐ U.S. Mail
- ☒ Personal Delivery
- ☐ Facsimile
- ☐ Other:


Elizabeth Koeckeritz
Assistant City Attorney

NO. _____
AM 10:47 FILED P.M. _____

JUN 13 2012

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

CARY B. COLAIANNI
BOISE CITY ATTORNEY

Elizabeth Koeckeritz
Assistant City Attorney
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, Idaho 83701-0500
Telephone: (208) 384-3870
Idaho State Bar No. 7670

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,)

Plaintiff,)

vs.)

MARK C. HUNTER,)

Defendant.)

Case No. CR-MD-2011-0005903

**AFFIDAVIT OF
ELIZABETH KOECKERITZ**

State of Idaho)

) ss.

County of Ada)

Comes now, Elizabeth Koeckeritz being first duly sworn on oath deposes and states:

1. The brief was originally due Monday, June 11, 2012.
2. No prior extension have previously been granted.
3. An extension is requested because the original handling attorney is no longer employed at the Boise City Attorney's office and the undersigned has had

AFFIDAVIT OF ELIZABETH KOECKERITZ- 1

at

000101

my

insufficient time to fully research and brief the issue after a late assignment of the appeal to the undersigned.

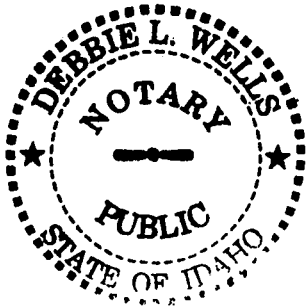
4. The undersigned requests an extension of eight days and assures this Court that the brief will be filed within that time period.

5. Opposing counsel has not been contacted concerning this motion.

Dated this 11th day of June, 2012.


Elizabeth Koeckeritz

SUBSCRIBED AND SWORN TO Before me on this 11 day of June, 2012.




NOTARY PUBLIC FOR IDAHO

Residing at Boise, Idaho

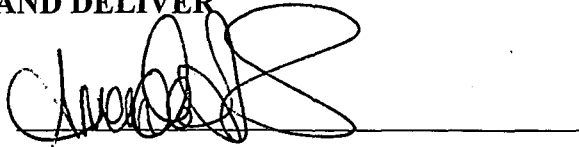
My Commission Expires: 4-3-18

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11 day of June, 2012, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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JUN 19 2012

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Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff/Appellant

vs.

MARK C. HUNTER,

Defendant/Respondent

Case No. CR-MD-2011-0005903

APPELLANT'S BRIEF

APPEAL FROM THE MAGISTRATE COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE KEVIN SWAIN, MAGISTRATE, PRESIDING

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ORIGINAL

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COMES NOW, the Appellant by and through Elizabeth A. Koeckeritz, Assistant Boise City Attorney, and hereby files its Appellant's Brief in the above-captioned matter.

STATEMENT OF THE CASE

Nature of the Case

The State appeals from the trial court's order granting the Defendant's motion to suppress.

Course of Proceedings and Statement of Facts

Mark Hunter was arrested for Driving While Under the Influence of Alcohol, second offense, in violation of Idaho Code §§ 18-8004(1)(a) and 18-8005(4) on April 16, 2011. He thereafter filed a motion to suppress, asserting that the "warrantless detention exceed[ed] the scope allowed during a traffic stop pursuant to the Sixth Amendment to the United States Constitution and Article 1, Section 17 of the Constitution of the State of Idaho." (Mot. To Vacate Jury Trial, Enlarge Time and Set Hr'g On Suppression Issue, p. 1.) The State objected to the motion (Objection To Mot. To Suppress), and the matter was set for a hearing (*See* ROA). Prior to the hearing, the parties entered the police report in the matter into evidence and stipulated that the court could consider its contents in reaching its decision regarding the motion to suppress. (Stipulated Admis. Of Police Reports.) The report reads, in relevant part:

On 4/16/11 at 0003 hours, Officer Lacow stopped a vehicle for driving without headlights at Myrtle and 8th. Officer Lacow requested a STEP assist and I responded for the STEP assist. . . .

Officer Lacow identified the driver as Mark Hunter by his Idaho driver's license. Officer Lacow stated that he observed the vehicle come from the parking garage at 9th and Front without headlights. Officer Lacow stated that the vehicle continued southbound on 9th and turned eastbound on Myrtle still without lights.

Officer Lacow stated that he stopped the vehicle at Myrtle and 8th. The passenger was identified as Carrie Pereira.

Officer Lacow stated that he could smell the odor of alcoholic beverage coming from the vehicle and Mark admitting to drinking. Officer Lacow stated he checked Mark's eyes for nystagmus while Mark [was] seated in the driver's seat. Officer Lacow stated he did observe nystagmus in Mark's eyes.

I had Mark step out of the vehicle to conduct standardized field sobriety tests on the sidewalk. Mark stated he was coming from Fatty's and was on his way home. Mark stated that he was at Quest Arena for the MMA fights earlier that night. Mark stated he consumed [three] Vodka tonics that night.¹ Mark stated that he had the beverages between 1930 and 2230 hours. While speaking to Mark, I could smell the odor of an alcoholic beverage coming from his person. I noticed that Mark's eyes were glassy and bloodshot. Mark stated that he was not taking any medications and did not have any physical impairments. Mark stated he did not have any recent head injuries or eye problems.

I conducted the horizontal gaze nystagmus test. Both of Mark's eyes did not pursue smoothly, had distinct and sustained nystagmus at maximum deviation and nystagmus onset before 45 degrees.

I asked Mark if he was comfortable with the shoes he was wearing. Mark stated that he was. I instructed and demonstrated the walk and turn test. Mark did not score any errors on the test.

I instructed and demonstrated the one leg stand test. Mark swayed during the test.

I checked Mark's eyes a second time and he had the same scoring errors as the first time.

I advised Mark that I was requiring him to give me a breath sample. I placed Mark in handcuffs. I placed Mark in the back of my vehicle. While Mark was in the back of my vehicle, I checked his mouth for any foreign substances and did not find any. I advised Mark not to burp, belch, or vomit for the fifteen minute waiting period. I played the ALS audio recording. After the fifteen minute waiting period, I had Mark blow into the Lifeloc instrument. Mark blew .090/088. Mark was advised of the results.

....

¹ The police report reads that Mark consumed four Vodka tonics that night. However, the state and defense stipulated that Mark told Officer Gibson he consumed three Vodka tonics that night. (See Stipulation.)

I transported Mark to the Ada County Jail. Mark was charged with DUI-2nd. (Ex. 1, Narrative Report Supplement.) The court held a brief hearing on the matter at which Officer Gibson, the arresting officer, testified. (Tr., p. 13, L. 23 through p. 20, L. 1.) The court issued a written decision in which it held that the defendant's arrest was not supported by probable cause and granted the defendant's motion to suppress. (Decision and Order.) The State filed a timely interlocutory appeal.

ISSUE ON APPEAL

Did the trial court err in concluding that the Defendant's (hereinafter "Hunter") arrest was not supported by probable cause?

ARGUMENT

The Trial Court Erred In Concluding That Hunter's Arrest Was Not Supported By Probable Cause.

1. Introduction

The trial court concluded that Hunter's arrest was not supported by probable cause. The court erred because, as a matter of law, the evidence available to the officer at the time of the arrest supplied probable cause for Hunter's arrest.

2. Standard of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. *State v. Klingler*, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006). The power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106,

897 P.2d 993, 997 (1995); *State v. Fleenor*, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct. App. 1999).

3. The Court Erred In Granting Hunter's Motion To Suppress.

A violation of Idaho Code § 18-8004, which prohibits driving under the influence of alcohol, may be proven either by direct and circumstantial evidence that use of alcohol has impaired the vehicle operator's ability to drive (the impairment theory) or, alternatively, by test results showing that the alcohol concentration in the operator's blood, breath or urine exceeded the statutory limit (the *per se* theory). Idaho Code § 18-8004. Evidence that is relevant to the impairment theory is not necessarily relevant to the *per se* theory. *State v. Ferreira*, 133 Idaho 474, 484, 988 P.2d 700, 710 (Ct. App. 1999); *State v. Andrus*, 118 Idaho 711, 713, 800 P.2d 107, 109 (Ct. App. 1990).

A search of a person without a warrant is presumptively violative of the Fourth Amendment to the United States Constitution and Article I, section 17 of the Idaho Constitution unless a recognized exception to the warrant requirement applies. *California v. Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619, 634 (1991); *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007); *State v. LeClercq*, 149 Idaho 905, 907, 243 P.3d 1093, 1095 (Ct.App.2010). One well-established exception is a search of the person incident to a lawful arrest. *United States v. Edwards*, 415 U.S. 800, 802, 94 S.Ct. 1234, 1236–37, 39 L.Ed.2d 771, 774–75 (1974); *State v. Foster*, 127 Idaho 723, 728, 905 P.2d 1032, 1037 (Ct.App.1995). Without a warrant, a lawful arrest may be made upon probable cause that a crime has been or is being committed in the officer's presence, and any evidence from an ensuing search is generally admissible. *State v. Bishop*, 146 Idaho 804, 816, 203 P.3d 1203, 1215 (2009).

Probable cause for an arrest exists where an officer possesses information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that a person they have placed under arrest is guilty of a crime. *See State v. Julian*, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996). Probable cause is not measured by the same level of proof required for conviction. *Id.* Rather, probable cause deals with the factual and practical considerations on which reasonable and prudent persons act. *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310–11 (1949); *Julian*, 129 Idaho at 136, 922 P.2d at 1062. The court must judge the facts against an objective standard when evaluating an officer's actions. *Julian*, 129 Idaho at 136, 922 P.2d at 1062. That is, whether the facts available to the officer, at the moment of the seizure or search, would warrant a reasonable person in holding the belief that the action taken was appropriate. *Id.*

Courts must also give recognition to the expertise of the officer. “In determining whether there is probable cause for an arrest, an officer is entitled to draw reasonable inferences from the available information in light of the knowledge that he has gained from his previous experience and training.” *State v. Kysar*, 116 Idaho 992, 993, 783 P.2d 859, 860 (Ct.App. 1999). *See also Ornelas v. United States*, 517 U.S. 690, 700, 116 S.Ct. 1657, 1663–64 (1996); *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975).

Application of the foregoing standards to the evidence presented at the suppression hearing demonstrates the court erred in granting Hunter’s motion to suppress because probable cause existed to arrest Hunter for driving under the influence.

The evidence presented to the court in the form of the police reports and the arresting officer's testimony provided probable cause to arrest Hunter for driving under the influence as a matter of law. After listening to the testimony of the arresting officer and reviewing the police reports, the court found the following: "Officer Gibson relied on three factors in deciding to arrest the defendant for driving under the influence: driving without headlights, admitted consumption of alcohol earlier that evening, and the result of the horizontal gaze nystagmus (HGN) test." (Decision and Order, p. 2.) However, the police reports contained numerous additional facts that the court failed to adequately consider in its probable cause determination: Hunter had driven several blocks without headlights in the dark at 0003 hours. Officer Gibson knew that the officer who initially stopped Hunter could smell the odor of alcohol coming from the open driver's side window of the vehicle and that Hunter admitted to drinking earlier that evening. He also knew that the officer that initially stopped Hunter had observed nystagmus in Hunter's eyes while Hunter was still seated in his vehicle. Officer Gibson corroborated the initial officer's observations by also noting the odor of alcoholic beverage coming from the vehicle and noting that Hunter's eyes were glassy and bloodshot. After Hunter exited his vehicle, Officer Gibson could smell the odor of alcohol coming from Hunter's person. He learned that Hunter was coming from Fatty's Bar, had previously been at the Mixed Martial Arts fights that evening, and was on his way home. Hunter told the officer that he had consumed three vodka tonics that night between the 1930 and 2230 hours (7:30 p.m. – 10:30 p.m.). Hunter also stated that he was not taking any medications, did not have any physical impairments, and did not have any recent head injuries or eye problems. Hunter failed the HGN test, showing 6 out of 6 signs of impairment. Hunter swayed during the one-leg stand test. Hunter did not score

any errors on the walk and turn test. Officer Gibson then re-administered the HGN test, which Hunter again failed. When all of these facts are considered collectively, the officer possessed probable cause to arrest Hunter for driving while under the influence of alcohol.

Further, the court improperly focused its decision on several factors which, standing alone may not supply probable cause but, when viewed collectively, give rise to a probable cause finding. The court wrote:

While driving without headlights is a valid reason for a stop, it is not compelling indicator of impairment by alcohol. The defendant corroborated the officer's observation of an odor of alcohol by admitting consumption earlier in the evening. However the amount admitted to over the time frame indicated could not lead directly to a conclusion the defendant was impaired at the time of the stop.

(Decision and Order, p. 2.)

In *Illinois v. Gates*, 462 U.S., 213, 243–244, n.13, 103 S.Ct. 2317, n.13 (1983), the United States Supreme Court noted that “innocent behavior will frequently provide the basis for a showing of probable cause,” and that “[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.” Although standing alone, driving without headlights may not be an indicator of impairment of alcohol, when viewed in conjunction with the other factors present, it provides a basis for probable cause to arrest. Likewise, although the amount of alcohol Hunter admitted to consuming over the time frame indicated would not directly lead to a conclusion that Hunter was impaired at the time of the stop, when viewed in light of the other factors present, it provides a basis for probable cause to arrest.

Finally, the trial court erred as a matter of law when it held “[t]he HGN test is a reliable indicator of impairment only if corroborated by other field sobriety tests” and cited *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991). (Decision and Order, p. 3.) In *Garrett*, the court stated: “Although we note that in conjunction with other field sobriety tests, a positive HGN test result does supply probable cause for arrest, standing alone that result does not provide proof positive of DUI, because many other factors may cause nystagmus.” 119 Idaho at 881, 811 P.2d at 491. The trial court misconstrued *Garrett’s* holding. *Garrett* addressed the admissibility of the HGN *at trial* and not in the probable cause context and held that a positive HGN test result is circumstantial evidence of impairment. The trial court read the first clause of the sentence too narrowly – it does not require a defendant to fail additional field sobriety tests before probable cause to arrest for driving while under the influence may be found, nor does it hold that a positive HGN test is negated by satisfactory performance on other field sobriety tests. Rather it notes that HGN plus additional field sobriety tests supplies probable cause to arrest. It does not state that if an individual fails the HGN test then he must also fail another field sobriety test before probable cause may be found. *Garrett* does not estop an officer from using common sense and determining that, after an individual drives without his headlights, admits to drinking, smells of alcohol, had bloodshot glassy eyes, and twice fails the HGN test, probable cause to arrest for driving while under the influence exists.

Here, the arresting officer used the HGN test in conjunction with other tests and observations. The HGN test was consistent with the officer’s observation of the defendant’s bloodshot and glassy eyes, odor of alcohol, admission and traffic violations. The officer also observed one indicia of alcohol impairment in Hunter’s performance of the one leg stand test.

Even though Hunter “passed” the one leg stand test, that indicia combined with the HGN test and the observation of Hunter’s physical characteristics and driving without headlights established probable cause to arrest for driving under the influence based upon the totality of the circumstances.

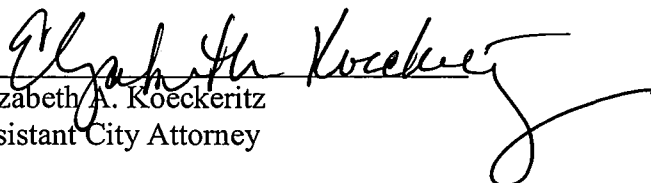
In *State v. Alger*, 100 Idaho 675, 677, 603 P.2d 1009, 1011 (1979), the court explained that the “adequacy of probable cause is not measured against the high standards required for conviction.” The court further explained that, “in dealing with probable cause. . . , as the very name implies, we deal with probabilities.” *Id.* at 677, 603 P.2d at 1011 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). “Probable cause does not require an officer to compile an ironclad case against a suspect. Rather, it deals with the probable cause of all facts considered as a whole.” *Id.* at 678, 603 P.2d at 1010. In this case, the arresting officer possessed ample probable cause to believe that Hunter was driving while under the influence of alcohol.

CONCLUSION

Based upon the above arguments, the Appellant requests this Court overrule the trial court’s finding that Hunter’s arrest was not supported by probable cause.

DATED this 19 day of June 2012.

BOISE CITY ATTORNEY’S OFFICE

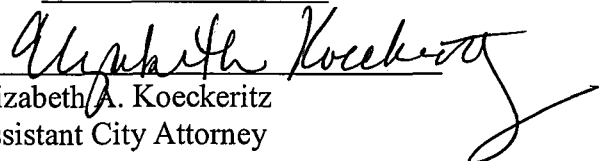

Elizabeth A. Koeckeritz
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have on this 19 day of June 2012, served the foregoing document on all parties of record as follows:

Erik J. O'Daniel
200 West Front Street, Suite 1107
Boise, ID 83702

- ☐ U.S. Mail
- ☒ Personal Delivery
- ☐ Facsimile
- ☐ Other: _____


Elizabeth A. Koeckeritz
Assistant City Attorney

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JUN 20 2012

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)

Plaintiff/Appellant,)

vs.)

MARK C. HUNTER,)

Defendant/Respondent.)

Appeal Case No. CR-MD-2011-0005903

ORDER FOR EXTENSION

THIS MATTER HAVING COME BEFORE the Court pursuant to the Motion for
Extension for extending the time in which the state's brief will be due.

IT IS HEREBY ORDERED that the state's request for extension is granted and
Appellants brief shall be due June 19th, 2012.

DATED this 20th day of June, 2012.

Kathryn A. Strickland
District Court Judge

JUL 25 2012

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff/Appellant,

vs.

MARK C. HUNTER,

Defendant/Respondent.

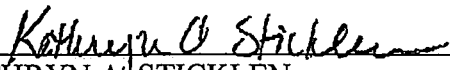
Case No. CR-MD-2011-0005903

**CONDITIONAL ORDER
ON APPEAL**

It appearing to the Court upon a review of the record in the above-entitled action that the Court entered an Order on March 29, 2012, requiring the Respondent to file with this Court a Respondent's brief within twenty eight (28) days of service of Appellant's brief; and it further appearing that the time for filing said brief has now expired;

IT IS HEREBY ORDERED, that this appeal may be decided upon Appellant's brief unless Respondent files a brief in support of its position within fourteen (14) days from the filing date of this Order.

Dated this 25th day of July 2012.


KATHRYN A. STICKLEN
Senior District Judge

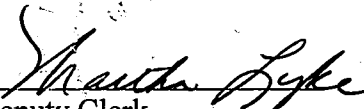
CERTIFICATE OF MAILING

I hereby certify that on this 26th day of July 2012, I mailed (served) a true and correct copy of the within instrument to:

BOISE CITY ATTORNEY
VIA: INTERDEPARTMENTAL MAIL

ADA COUNTY PUBLIC DEFENDER
VIA: INTERDEPARTMENTAL MAIL

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk

192

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DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,
Plaintiff-Appellant,

vs.

MARK C. HUNTER,
Defendant-Respondent.

CR-MD-2011-5903
ON APPEAL TO DISTRICT COURT

RESPONDENT'S BRIEF

APPEAL FROM THE MAGISTRATE COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE HONORABLE KEVIN SWAIN, MAGISTRATE, PRESIDING

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<u>State v. Garrett</u> , 119 Idaho 878, 881 (1991)	1, 3
<u>State v. Jones</u> , 115 Idaho 1029, 1033, 772 P.2d 236, 240 (Ct. App. 1989)	2
<u>State v. Schevers</u> , 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999)	2
<u>State v. Valdez-Molina</u> , 127 Idaho 102, 106, 897 P.2d 993, 997 (1995)	2
<u>State v. Wigginton</u> , 142 Idaho 180, 125 P.3d 536 (Ct. App. 2005)	3

COMES NOW the Respondent, by and through Erik O'Daniel, Deputy Public Defender, Ada County, and files his Respondent's Brief in the above-captioned matter.

STATEMENT OF THE CASE

Based on an event occurring on 16 April 2011, Hunter was charged with a DUI in Boise, Idaho. Defense counsel eventually filed a motion to suppress evidence, to which the state objected. The court required counsel to brief the issue of timeliness, and eventually found good cause to exceed the normal Rule 12 requirement.

The parties stipulated to admit the police report with a correction as noted in the stipulation of the parties. A short evidentiary hearing was held on 7 November 2011.

On 7 December 2011, the magistrate granted Hunter's motion and suppressed the result of the breath test. The magistrate's Decision and Order lay out the specific facts found by the court:

On April 16th at three minutes after midnight the defendant was stopped at eighth and Myrtle for driving without headlights. There was the odor of alcohol and the defendant admitted drinking three vodka tonics between 7:30 and 10:30. Officer Robert Gibson responded and conducted three field sobriety tests. The defendant failed the horizontal gaze nystagmus test, but passed the one leg stand and the walk and turn tests. The defendant was then arrested and submitted to a breath test which resulted in readings of .090 and .088.

Applying the relevant law to these facts, the court concluded that the HGN test was rendered unreliable as a matter of law, pursuant to State v. Garrett, 119 Idaho 878, 881 (1991). The court further concluded that the remaining factors were insufficient to establish probable cause for an arrest. Therefore, the evidentiary test obtained in this case must be suppressed.

The State appeals.

ISSUE ON APPEAL

The magistrate court did not err in suppressing the result of the evidentiary testing, following an arrest made without probable cause.

STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. State v. Atkinson, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); State v. Schevers, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

ARGUMENT

The arrest made in this case was not supported by probable cause, therefore suppression of the evidentiary testing was not error. Hunter adopts the magistrate's reasoning in the court's Decision and Order of 6 December 2011.

The State asserts that additional facts were before the arresting officer, which facts supplied probable cause for the arrest and require reversal of the court's order. This is not the case.

The Idaho Court of Appeals has published at least four opinions regarding the "probable cause" value of the Standardized Field Sobriety Tests. Chronologically:

- State v. Jones, 115 Idaho 1029, 1033, 772 P.2d 236, 240 (Ct. App. 1989). The request to perform field sobriety tests is a reasonable attempt by the officer to obtain information **confirming or dispelling** the officer's suspicion that the driver was driving while under the influence.

- State v. Ferreira, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999), Field sobriety tests are the least intrusive means reasonably available to **verify or dispel** the officer's suspicion in a short period of time that a driver is in violation of I.C. § 18-8004.
- State v. Wigginton, 142 Idaho 180, 125 P.3d 536 (Ct. App. 2005). Suspicion of DUI, which initially motivated the traffic stop, was **removed** when Wigginton performed satisfactorily on the sobriety tests.
- State v. Buell, 145 Idaho 54, 175 P.3d 216 (Ct. App. 2008). Field sobriety tests are a reasonable part of the process to investigate suspected DUI and are the least intrusive means reasonably available in a short timeframe to **confirm or dispel** the officer's suspicion.

The facts the state relies on in its argument are the facts that gave rise to the reasonable and articulable suspicion in the first place, and which allowed the officer to administer the field sobriety tests that Hunter passed. The case law is clear, and is authoritative: 1) If a person is suspected of operating a vehicle while under the influence of alcohol, the field sobriety tests are the least intrusive means to confirm or dispel the officer's suspicion; and 2) If a suspect passes the field sobriety tests, the officer's reasonable suspicion of a law violation is dispelled. The magistrate found that Hunter failed the HGN test, but passed the two physical tests. The court relied on Garrett to find that the physical tests failed to corroborate the HGN test, and the result of the HGN test was rendered unreliable. The court then ruled that the arrest was made without probable cause, and suppressed the evidentiary test obtained following that arrest.

The factual findings are supported by substantial evidence and the court's conclusion is correct.

CONCLUSION

The state's assertion that the facts which gave rise to a reasonable suspicion can also give rise to probable cause to arrest even if the suspect passes the field sobriety tests is incorrect and contrary to two decades of case law. The Decision and Order of the magistrate court must be affirmed.

DATED, 8 August 2012.



Erik O'Daniel
Attorney for Defendant

CERTIFICATE OF SERVICE - I HEREBY CERTIFY that on 8 August 2012, I caused to be hand-delivered to the following agency a true and correct copy of the foregoing document:

☐ ADA COUNTY PROSECUTOR
☒ BOISE CITY ATTORNEY

☐ GARDEN CITY ATTORNEY
☐ EAGLE CITY ATTORNEY



Erik O'Daniel

192

NO. 11:53 FILED
A.M. 53 P.M.

AUG 28 2012

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Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,)	
)	
Plaintiff/Appellant,	)	Case No. CR-MD-2011-0005903
)	
vs.)	
)	
MARK C HUNTER,	)	REPLY BRIEF
)	
Defendant/Respondent.)	
)	

APPEAL FROM THE MAGISTRATE COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HON. KEVIN SWAIN, MAGISTRATE, PRESIDING

Erik J. O'Daniel
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ORIGINAL

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COMES NOW, the Appellant by and through Elizabeth A. Koeckeritz, Assistant City Attorney, and hereby files its Reply Brief in the above-captioned matter.

REBUTTAL ARGUMENT

The Trial Court Erred In Granting Hunter's Motion To Suppress

A. Introduction

The trial court erred when it granted Hunter's motion to suppress, concluding that Hunter's arrest was not supported by probable cause. The court erred because the evidence presented was more than sufficient to supply probable cause to arrest for DUI. Hunter asserts that the trial court was correct in its ruling, arguing that "if a suspect passes the field sobriety tests, the officer's reasonable suspicion of a law violation is dispelled." (Respondent's brief, p. 3.) He further misconstrues the state's argument and writes, "the state's assertion that the fact which gave rise to a reasonable suspicion can also give rise to probable cause to arrest even if the suspect passes the field sobriety tests is incorrect and contrary to two decades of case law." (Respondent's brief, p. 4.) The state contends that Hunter's arguments must fail, however, because they are without merit and contrary to the law.

B. The Trial Court Erred When It Granted Hunter's Motion To Suppress

Hunter asserts, "1) If a person is suspected of operating a vehicle while under the influence of alcohol, the field sobriety tests are the least intrusive means to confirm or dispel the officer's suspicion; and 2) If a suspect passes the field sobriety tests, the officer's reasonable suspicion of a law violation is dispelled." (Respondent's brief, p. 3.) This is simply not the law.

In support of the proposition that field sobriety tests are the least intrusive means to confirm or dispel the officer's suspicion whether an individual is driving under the influence, Hunter cites four cases. However, nothing in the four cases that Hunter cites stands for the proposition that an individual must perform field sobriety tests, or that satisfactory performance on those tests negates the other facts which an officer has in his possession. For example, Hunter cites *State v. Jones*, 115 Idaho 1029, 772 P.2d 236 (Ct. App. 1989), for the proposition that "the request to perform field sobriety tests is a reasonable attempt by the officer to obtain information confirming or dispelling the officer's suspicion that the driver was driving while under the influence." (Respondent's brief, p. 2.) The actual sentence from the case reads, "This questioning, including the officer request that Jones perform field sobriety tests, were reasonable attempts by the officer to obtain information confirming or dispelling the officer's suspicions." *Jones*, 115 Idaho at 1033, 772 P.2d at 240 (internal citation omitted). Thus, contrary to Hunter's assertion, the court does not look *only* at field sobriety tests in making its determination but also looks at questioning and other factors.

Likewise, Hunter cites *State v. Ferreira*, 113 Idaho 474, 988 P.2d 700 (Ct. App. 1999) and *State v. Buell*, 145 Idaho 54, 175 P.3d 216 (Ct. App. 2008), for the proposition that field sobriety tests are the least intrusive means reasonably available in a short timeframe to reasonable confirm or dispel the officer's suspicion. (Respondent's brief, p. 3.) While the state does not dispute this statement, it is important to note that in neither case did the court hold that field sobriety tests were the *only* way to confirm or dispel an officer's suspicion of DUI *or* that an officer could not use his common sense judgment and look to other factors in deciding that probable cause existed to arrest. Importantly, none of these cases hold that an officer must

ignore other indicia of being under the influence simply because an individual performs satisfactorily on one field sobriety test.

Probable cause to arrest for DUI may exist even if an individual does not perform field sobriety tests and probable cause to arrest may exist on lesser facts than those in present in the instant case. See *State v. Finnicum*, 147 Idaho 137, 140, 206 P.3d 501, 504 (Ct.App.2009) (officers had probable cause to arrest where defendant smelled strongly of alcohol, slurred her speech, had bloodshot eyes, seemed confused, and a witness opined she was highly intoxicated); *State v. Martinez-Gonzalez*, 152 Idaho 775, --, 275 P.3d 1, 6 (Ct. App. 2012) (officers had probable cause to arrest where 1) officers observed open beer cans in defendant's vehicle, 2) defendant had slightly glazed eyes and slurred speech, 3) an odor of alcohol was present, 4) defendant admitted to consuming alcohol, 4) defendant drove his vehicle immediately after officers told him not to drive). Here, evidence existed beyond that which a court found sufficient to support probable cause in *Finnicum* or *Martinez-Gonzalez*: Hunter had driven several blocks without headlights in the dark at 0003 hours. Officer Gibson knew that the officer who initially stopped Hunter could smell the odor of alcohol coming from the open driver's side window of the vehicle and that Hunter admitted to drinking earlier that evening. He also knew that the officer that initially stopped Hunter had observed nystagmus in Hunter's eyes while Hunter was still seated in his vehicle. Officer Gibson corroborated the initial officer's observations by also noting the odor of alcoholic beverage coming from the vehicle and noting that Hunter's eyes were glassy and bloodshot. After Hunter exited his vehicle, Officer Gibson could smell the odor of alcohol coming from Hunter's person. He learned that Hunter was coming from Fatty's Bar, had previously been at the Mixed Martial Arts fights that evening, and was on his way home.

Hunter told the officer that he had consumed three vodka tonics that night between the 1930 and 2230 hours (7:30 p.m. – 10:30 p.m.). Hunter also stated that he was not taking any medications, did not have any physical impairments, and did not have any recent head injuries or eye problems. Hunter failed the HGN test, showing 6 out of 6 signs of impairment. Hunter swayed during the one-leg stand test. Hunter did not score any errors on the walk and turn test. Officer Gibson then re-administered the HGN test, which Hunter again failed. These observations provided more probable cause than found in either *Finnicum* or *Martinez-Gonzalez*.

Further, nothing requires an officer to disregard his observations simply because an individual performs satisfactorily on some field sobriety tests. The trial court misconstrued the holding of *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (Idaho 1991). In *Garrett*, the defendant was administered seven field sobriety tests, including the HGN, on suspicion of DUI. The defendant refused a BAC test. At trial, the state presented testimony that despite there not being a blow, the defendant's HGN test result was proof that he was over the legal limit. The Supreme Court found that the admission of that testimony was error, but in light of the other FST results, it was not reversible error. *Garrett*, 119 Idaho at 882, 811 at 492. The Court further held that an HGN test result alone could not be correlated to a particular BAC level, and that although an "...HGN test result does supply probable cause for arrest, standing alone that result does not provide proof positive of DUI, because many other factors may cause nystagmus." *Garrett*, 119 Idaho at 881, 811 at 491. To hold, as the court did in Hunter, that *Garrett* stands for the proposition that "[t]he HGN test is a reliable indicator of impairment only if corroborated by other field sobriety tests" misconstrues the holding of that case. Rather, *Garrett* simply stands for the proposition that the HGN test alone cannot be used to testify to a defendant's particular

BAC level or used alone to show that the a defendant was “under the influence.” Here, the state is neither seeking to use the HGN test result at trial to have the officer correlate it to a certain BAC level, nor to use the HGN test as proof positive that Hunter was “under the influence.” Rather, the state is simply seeking to use the HGN test result as part of its probable cause determination – a purpose which in no way is prohibited by the holding of *Garrett*.

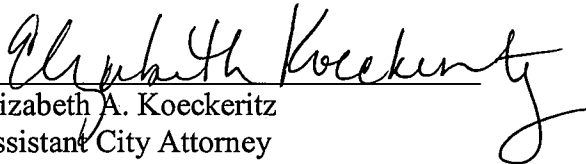
The officer used the HGN test in conjunction with other tests and observations in developing probable cause to arrest Hunter for DUI. The HGN test was consistent with the officer’s observation of the Hunter’s bloodshot and glassy eyes, odor of alcohol, admissions, traffic violation, and performance on the one-leg stand. Nothing in the law requires the officer to disregard these factors simply because Hunter performed satisfactorily on the walk-and-turn test and showed only one indicia of impairment on the one-leg stand. Probable cause requires an examination of “all facts considered as a whole.” *State v. Alger*, 100 Idaho 675, 678, 603 P.2d 1009, 1010 (1979). Because “all of the facts considered as a whole” give rise to probable cause to arrest Hunter, this Court should reverse the trial court and hold that Hunter’s arrest was supported by probable cause.

CONCLUSION

Based upon the above arguments, the Appellant requests this Court to reverse the trial court and hold that Hunter’s arrest was supported by probable cause.

DATED this 28th day of August 2012.

BOISE CITY ATTORNEY'S OFFICE

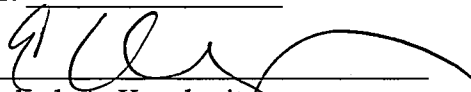

Elizabeth A. Koeckeritz
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of August 2012, served the foregoing document on all parties of record as follows:

Erik J. O'Daniel
200 West Front Street, Suite 1107
Boise, ID 83702

- ☐ U.S. Mail
- ☒ Personal Delivery
- ☐ Facsimile
- ☐ Other:


Elizabeth A. Koeckeritz
Assistant City Attorney

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SEP 19 2012

CHRISTOPHER D. RICH, Clerk
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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,

Plaintiff,

vs.

MARK C. HUNTER,

Defendant.

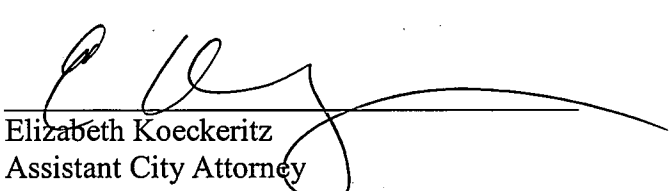
Case No. CR-MD-2011-0005903

NOTICE OF HEARING

TO: Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

Please take note that the State of Idaho will call forth its ORAL ARGUMENT
HEARING before Judge Stricklin, on the 18th of October, 2012, at 2:30 PM.

Dated this 19th day of September, 2012.


Elizabeth Koeckeritz
Assistant City Attorney

NOTICE OF HEARING

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at

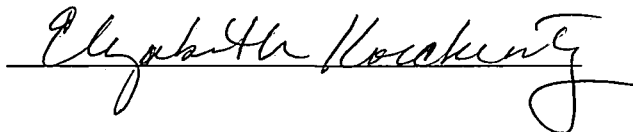
MD

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of September, 2012, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Erik J. O'Daniel
Ada County Public Defender
200 W. Front Street, Room 1107
Boise, ID 83702

☐ US MAIL
☐ INTERDEPARTMENTAL MAIL
☐ FACSIMILE
☒ HAND DELIVER



Time	Speaker	Note
02:26:47 PM	Court	called ST v MARK HUNTER CRMD11-0005903
02:27:16 PM	ELIZABETH KOECKERITZ	on behalf of City of Boise
02:27:20 PM	Erik O'Daniel	on behalf of Mark Hunter
02:30:38 PM	Ms. Koeckeritz	argued. re: probable cause, request the Court reverse the suppression ruling and placed back on pre trial calendar
02:36:28 PM	Court	remand for correct standard
02:36:41 PM	Ms. Koeckeritz	response
02:37:04 PM	Court	asks this question because it is not this Court's role to re-weigh the facts
02:37:30 PM	Ms. Koeckeritz	re: Jones case and how the facts applied, believe misapplied and could be reversed and find there was probable cause.
02:37:33 PM	Erik O'Daniel	argued if don't have reasonable suspicion, can't get to probable cause. Don't think Magistrate applied wrong standard.
02:46:03 PM	Ms. Koeckeritz	State asks the Court to review the cases, don't stand for the standard Mr. Hunter is advocating. Totally disregarded HGN results. Recent case of St vs Anderson not argued by parties, dog sniff case. Request Court remand this case.
02:50:05 PM	Court	will review Anderson case.
02:50:14 PM	End Case	

MAR 29 2013

CHRISTOPHER D. RICH, Clerk
By AMY LYCAN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)	
)	
Plaintiff/Appellant,)	
	)	Case No. CR-MD-2011-0005903
vs.)	
	)	MEMORANDUM DECISION
MARK C. HUNTER,	)	AND ORDER
)	
Defendant/Respondent.)	
_____)	

This is an appeal by the State of the magistrate's decision, Hon. Kevin Swain, granting the defendant's Mark Hunter's (Hunter's) motion to suppress. For the reasons set forth hereinafter, the magistrate's decision will be reversed and this case remanded for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

The magistrate found the following facts in his December 6, 2011 decision:

This is a motion to suppress the results of the defendant's breath test. The parties have stipulated to the pertinent facts which are as follows: On April 16th 2011 at three minutes after midnight the defendant was stopped at Eighth and Myrtle for driving without headlights. There was the odor of alcohol and the defendant admitted drinking three vodka tonics between 7:30 and 10:30. Officer Robert Gibson responded and conducted three field sobriety tests. The defendant failed the horizontal gaze nystagmus test, but passed the one leg stand and the walk turn tests. The defendant was then arrested and submitted to a breath test which resulted in readings of .090 and .088. Decision and Order, at 1.

In addition, the following also appears to be undisputed:

Mark Hunter was arrested Driving Under the Influence of Alcohol, second offense, in violation of Idaho Code §§ 18-8004(1)(a) and 18-8005(4) on April 16, 2011. He thereafter filed a motion to suppress, asserting that the ‘warrantless detention exceed(ed) the scope allowed during a traffic stop pursuant to the Sixth Amendment to the United States Constitution and Article 1, Section 17 of the Constitution of the State of Idaho.’ The State objected to the motion and the matter was set for a hearing. Prior to the hearing, the parties entered the police report in the matter into evidence and stipulated that the court could consider its contents in reaching its decision regarding the motion to suppress. The report reads, in relevant part:

On 4/16/11 at 0003 hours, Officer Lacow stopped a vehicle for driving without headlights at Myrtle and 8th. Officer Lacow requested a STEP assist and I responded for the STEP assist . . .

Officer Lacow identified the driver as Mark Hunter by his Idaho driver’s license. Officer Lacow stated that he observed the vehicle come from the parking garage at 9th and Front without headlights. Officer Lacow stated that the vehicle continued southbound on 9th and turned eastbound on Myrtle still without lights.

Officer Lacow stated that he stopped the vehicle at Myrtle and 8th. The passenger was identified as Carrie Pereira.

Officer Lacow stated that he could smell the odor of alcoholic beverage coming from the vehicle and Mark admitting to drinking. Officer Lacow stated he checked Mark’s eyes for nystagmus¹ while Mark (was) seated in the driver’s seat. Officer Lacow stated he did observe nystagmus in Mark’s eyes.

I had Mark step out of the vehicle to conduct standardized field sobriety tests on the sidewalk. Mark stated he was coming from Fatty’s and was on his way home. Mark stated that he was at Quest Arena for the MMA fights earlier that night. Mark stated he consumed (three) Vodka tonics that night.² Mark stated that he had the beverages between 1930 and 2230 hours. While speaking to Mark, I could smell the odor of an alcoholic beverage coming from his person. I noticed that Mark’s eyes were glassy and bloodshot. Mark stated that he was not taking any medications and did not have

¹“Gaze nystagmus [is] an involuntary movement of the eyeballs when the individual looks to the side, which is evidence of intoxication.” *State v. Johnson*, 132 Idaho 726, 731, 979 P.2d 128, 133 (Ct. App. 1999).

²“The police report reads that Mark consumed four Vodka tonics that night. However, the state and defense stipulated that Mark told Officer Gibson he consumed three Vodka tonics that night.” Appellant’s Brief, at 2 n.1.

any physical impairments. Mark stated he did not have any recent head injuries or eye problems.

I conducted the horizontal gaze nystagmus test. Both of Mark's eyes did not pursue smoothly, had distinct and sustained nystagmus at maximum deviation and nystagmus onset before 45 degrees.

I asked Mark if he was comfortable with the shoes he was wearing. Mark stated that he was. I instructed and demonstrated the walk and turn test. Mark did not score any errors on the test.

I instructed and demonstrated the one leg stand test. Mark swayed during the test.

I checked Mark's eyes a second time and he had the same scoring errors as the first time.

I advised Mark that I was requiring him to give me a breath sample. I placed Mark in handcuffs. I placed Mark in the back of my vehicle. While Mark was in the back of my vehicle, I checked his mouth for any foreign substances and did not find any. I advised Mark not to burp, belch, or vomit for the fifteen minute waiting period, I had Mark blow into the Lifeloc instrument. Mark blew .090/088. Mark was advised of the results . . .

I transported Mark to the Ada County Jail. Mark was charged with DUI-2nd.

The court held a brief hearing on the matter at which Officer Gibson, the arresting officer, testified. The court issued a written decision in which it held that the defendant's arrest was not supported by probable cause and granted the defendant's motion to suppress. The State filed a timely interlocutory appeal. Appellant's Brief, at 1-3. (internal citations omitted).

STANDARD OF REVIEW

A. Generally

When a district judge considers an appeal from a magistrate judge (not involving a trial de novo), the district judge is acting as an appellate court, not as a trial court. *State v. Kenner*, 121 Idaho 594, 596, 826 P.2d 1306, 1308 (1992). The interpretation of law or statute is a

question of law over which the Court has free review. *State v. Miller*, 134 Idaho 458, 462, 4 P.3d 570, 574 (Ct. App. 2000).

Idaho Criminal Rule 54.1 provides that the following judgments and orders are appealable from a magistrate to a district court: “(a) A final judgment of conviction; (b) By a defendant only, from an order granting or denying a withheld judgment on a verdict or plea of guilty; (c) An order granting a motion to dismiss a complaint; (d) *An order granting a motion to suppress evidence in a misdemeanor criminal action*; (e) An order denying a motion for new trial; (f) An order made after judgment affecting the substantial rights of the defendant or the state; (g) Any order, judgment or decree in a special criminal proceeding in which an appeal is provided by statute; (h) Any order holding a person in contempt of court other than those contempts defined in Rule 42(a); (i) An interlocutory order when processed in the manner provided by Rule 12 of the Idaho Appellate Rules and accepted by the district court.” (Emphasis added).

“When an exercise of discretion is involved, this Court conducts a three step analysis (1) whether the trial court perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the trial court reached its decision by the exercise of reason.” *Cameron v. Neal*, 130 Idaho 898, 902, 950 P.2d 1237, 1241 (1997).

B. Suppression

“At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court.” *State v. Young*, 144 Idaho 646, 648, 167 P.3d 783, 785 (Ct. App. 2007).

“When reviewing ‘seizure’ issues, we defer to the trial court’s factual findings unless they are clearly erroneous.³ We freely review, de novo, the trial court’s legal determination of whether or not an illegal seizure occurred.” *State v. Schwarz*, 133 Idaho 463, 466, 988 P.2d 689, 692 (1999).

ANALYSIS

In this appeal, the State asserts that “the trial court erred in concluding that Hunter’s arrest was not supported by probable cause.” Appellant’s Brief, at 3. “The trial court erred because, as a matter of law, the evidence available to the officer at the time of the arrest supplied probable cause for Hunter’s arrest.” *Id.*

In his decision, the magistrate framed the issue before him: “It is clear the breath test was obtained after the defendant’s arrest. The investigative detention had ended at that point. If the arrest was supported by probable cause the breath test is admissible. If the arrest was not supported by probable cause the breath test is a product of an illegal arrest and must be suppressed.” Decision and Order, at 2.

“It is clear Officer Gibson relied heavily on the defendant’s failure of the HGN test in making his decision to arrest.⁴ Officer Gibson testified he places more importance on that test because the subject cannot practice for the test. This does not comport with the applicable law concerning the reliability of the HGN test. The HGN test is a reliable indicator of impairment only if corroborated by other field sobriety tests.” *Id.*

³See also *State v. Watts*, 142 Idaho 230, 234, 127 P.3d 133, 137 (2005) (“The Court accepts the trial court’s findings of fact if supported by substantial evidence.”).

⁴Actually, Officer Gibson, who testified that he had conducted “several hundred” DUI investigations, testified that “I just have to take into account everything that I am seeing, but the eyes are . . . I factor that into a little bit more . . . it’s just a . . . body function they have no control over.” November 7, 2011 Hearing Transcript, at 14, 18.

The magistrate cited *State v. Garrett*, 119 Idaho 878, 881 (1991) for the proposition that “in conjunction with other field sobriety tests, a positive HGN test result does supply probable cause for an arrest, standing alone that result does not provide positive proof of DUI, because many other factors may cause nystagmus.” *Id.*, at 2-3.

The magistrate found that “the other field sobriety tests not only failed to corroborate the HGN test, they completely contradicted it. The defendant demonstrated virtually no impairment when performing the one leg stand and no impairment at all when performing the walk and turn test. The results of those tests rendered the HGN test unreliable as a matter of law. The remaining factors considered by the officer, even taken together, fail to rise to the level of probable cause to support an arrest.” *Id.*, at 3.

The State argues that “[t]he evidence presented to the court in the form of the police reports and the arresting officer’s testimony provided probable cause to arrest Hunter for driving under the influence as a matter of law.” Appellant’s Brief, at 6.

“Probable cause for an arrest exists where an officer possesses information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that a person they have placed under arrest is guilty of a crime. Probable cause is not measured by the same level of proof required for conviction. Rather, probable cause deals with the factual and practical considerations on which reasonable and prudent persons act. The court must judge the facts against an objective standard when evaluating an officer’s actions. That is, whether the facts available to the officer at the moment of the seizure or search, would warrant a reasonable person in holding the belief that the action taken was appropriate.” *State v. Martinez-Gonzalez*, 152 Idaho 775, 779, 275 P.3d 1, 5 (Ct. App. 2012) (internal citations omitted).

The question before this Court is whether Officer Gibson possessed probable cause to believe that Hunter had been driving under the influence at the time he was arrested, which was before he was administered the breath tests. In other words, whether Officer Gibson, at the time of his arrest of Hunter “possess[ed] information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that” Hunter was guilty of a crime.

“Idaho Code § 18-8004(1) makes it a crime ‘for any person who is under the influence of alcohol . . . to drive or be in actual physical control of a motor vehicle within this state . . . upon public or private property open to the public.’” *Martinez-Gonzalez*, 275 P.3d at 5.

“This Court has had numerous occasions to determine whether the findings of fact in a particular case constitute probable cause to arrest under suspicion of driving under the influence. In some instances, we have found probable cause where the defendant had driven erratically, emitted a strong odor of alcohol, slurred his speech, and admitted to consuming alcohol . . . Under other circumstances, we have found reasonable suspicion on similar facts.” *Martinez-Gonzalez*, 275 P.3d at 5-6.

There was little testimony given during the suppression hearing, since the parties had already stipulated to the factual content contained in Officer Gibson’s police report. *See* November 7, 2011 Suppression Hearing Transcript, at 8 (“[T]he parties are willing to stipulate to admission of the police report as an exhibit . . . in lieu of putting an officer on the stand and having him re-hash what his reports says.”). *See also* Stipulated Admission of Police Reports.

According to the police report, at the time of Hunter’s arrest, Officer Gibson was in possession of the following facts with which to find probable cause that Hunter had been driving under the influence: (1) he observed him for a distance driving at night with his headlights off;

(2) “he could smell the odor of an alcoholic beverage coming from the vehicle and Mark admitted to drinking;” (3) “he did observe nystagmus in Mark’s eyes;” (4) “Mark stated that he consumed [three] Vodka tonics;” (5) “[w]hile speaking to Mark, I could smell the odor of an alcoholic beverage coming from his person. I noticed that Mark’s eyes were glassy and bloodshot. Mark stated that he was not taking any medications and did not have any physical impairments. Mark stated he did not have any recent head injuries or eye problems. I conducted the horizontal gaze nystagmus test. Both of Mark’s eyes did not pursue smoothly, had distinct and sustained nystagmus at maximum deviation and nystagmus onset before 45 degrees;” (6) “I instructed and demonstrated the one leg stand test. Mark swayed during the test;” and (7) “I checked Mark’s eyes a second time and he had the same scoring errors as the first time.” Boise Police Report – Driving Under the Influence (DR 2011-108828).

At the time Officer Gibson placed Hunter under arrest, he knew that Hunter had been driving for a while without his headlights on at night, his eyes were bloodshot and glassy, there was an odor of alcohol coming from him and his vehicle, he admitted to having consumed three vodka tonics, he twice failed the nystagmus test (in the absence of taking any medications or possessing any physical impairments, recent head injuries, or eye problems), and he swayed during the one leg stand test.

In the Court’s view, pursuant to the guidance set forth by the Idaho Court of Appeals in *Martinez-Gonzalez*,⁵ Officer Gibson possessed information that would lead a person of ordinary

⁵See *Martinez-Gonzalez*, 275 P.3d at 5-6 (“[W]e have found probable cause where the defendant had driven erratically, emitted a strong odor of alcohol, slurred his speech, and admitted to consuming alcohol . . . officers had probable cause where defendant smelled strongly of alcohol, slurred her speech, had bloodshot eyes, seemed confused, and a witness opined she was highly intoxicated . . . probable cause established where driver weaved in and out of his lane, smelled of alcohol, slurred his speech, had bloodshot eyes, and admitted to drinking . . . [probable cause and/or reasonable suspicion:] defendant was speeding before being pulled over, emitted a strong odor of alcohol, and admitted to consuming alcohol . . . officers observed open beer cans in the vehicle where Martinez-Gonzalez sat in the driver’ seat . . . [he] had slightly glazed eyes and slurred speech . . . an odor of alcohol

care and prudence to believe or entertain an honest and strong presumption that Hunter had been driving under the influence. In other words, Officer Gibson had probable cause to arrest Hunter for driving under the influence.

The magistrate correctly noted that *State v. Garrett*, 119 Idaho 878, 881, 811 P.2d 488, 491 (1991) states “in conjunction with other field sobriety tests, a positive HGN test result does supply probable cause for arrest, standing alone that result does not provide proof positive of DUI, because many other factors may cause nystagmus.”⁶ However, that was not all the evidence Officer Gibson relied upon. The Court does not agree with the magistrate’s legal conclusion, which is freely reviewed here, that “[t]he remaining factors considered by the officer, even taken together, fail to rise to the level of probable cause to support an arrest.” Decision and Order, at 3. The magistrate focused too narrowly on the language of *Garrett*.

Hunter argues “if a suspect passes the field sobriety tests, the officer’s reasonable suspicion of a law violation is dispelled.” Respondent’s Brief, at 3. However, even assuming that this assertion of law is correct,⁷ it is not factually accurate here. Hunter (twice) failed the nystagmus test and he also “swayed” during the one leg stand test.⁸

[was] present . . . [he] admitted to consuming alcohol . . . and [he] drove his vehicle across the parking lot immediately after the officers advised him not to.”).

⁶“[F]actors other than alcohol in the bloodstream can cause nystagmus. Nystagmus may be congenital, or due to a variety of factors that affect the brain.” 119 Idaho at 881, 811 P.2d at 491.

⁷See, e.g., *State v. Wigginton*, 142 Idaho 180, 183, 125 P.3d 536, 539 (Ct. App. 2005) (“[T]he suspicion of DUI . . . was removed when Wigginton performed satisfactorily on the sobriety test[s] . . .”).

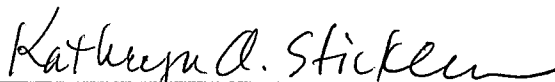
⁸Officer Gibson conducted three field sobriety tests on Hunter: horizontal gaze nystagmus (HGN), walk and turn, and one leg stand. He assessed Hunter six points for the HGN (decision points four or more), zero points for the walk and turn (decision points two or more), and one point for the one leg stand (decision points two or more). See DUI Supplement (DR# 108-828). A “decision point” has been defined as indicating “a possibility of intoxication.” See *Hogan v. State*, 2010 WL 2367497, *5 (Tex. Ct. App.).

CONCLUSION

Accordingly, in view of the foregoing, the district court hereby reverses the magistrate's decision granting Hunter's suppression motion.⁹ This case is remanded for further proceedings consistent with this memorandum decision and order.

IT IS SO ORDERED.

Dated this 28th day of March 2013.


Kathryn A. Sticklen
Senior District Judge

⁹“As the defendant's arrest was not supported by probable cause, and the breath test is a product of that arrest, the defendant's motion to suppress the breath test is hereby, GRANTED.” Decision and Order, at 3.

CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the parties of record in this cause in envelopes addressed as follows:

BOISE CITY PROSECUTOR
VIA INTERDEPARTMENTAL MAIL

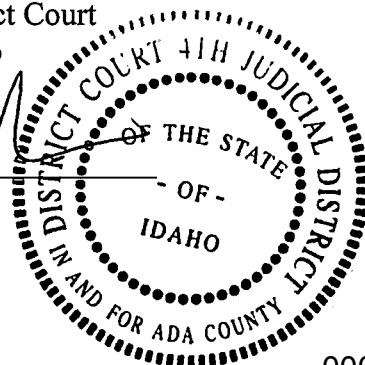
ADA COUNTY PUBLIC DEFENDER
VIA INTERDEPARTMENTAL MAIL

HON. KEVIN SWAIN
INTERDEPARTMENTAL MAIL

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: 3-29-13

By [Signature]
Deputy Clerk



ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
200 W. Front, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400

NO. _____
A.M. _____ FILED P.M. 344

APR 12 2013

CHRISTOPHER D. RICH, Clerk
By MAURA OLSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO)	
)	
Plaintiff-Respondent,)	
)	
vs.	)	Criminal No. CR-MD-2011-0005903
)	
	)	NOTICE OF APPEAL
MARK C. HUNTER,)	
)	
Defendant-Appellant.)	
_____)	

TO: THE ABOVE NAMED RESPONDENT, GREG BOWER, ADA COUNTY
PROSECUTOR, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant appeals against the above-named respondent to the Idaho Supreme Court from the final Decision and Order entered against him in the above-entitled action on the 29th day of March, 2013, the Honorable Sticklen, District Judge presiding.
2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Idaho Appellate Rule (I.A.R.) 11(c)(1-10).
3. A preliminary statement of the issues on appeal, which the appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal, is/are:

NOTICE OF APPEAL, Page 1

000151

- (a) Did the District Judge err in reversing the Magistrate's Order Granting the Defendant's Motion to Suppress?

4. There is a portion of the record that is sealed. That portion of the record that is sealed is the Pre-Sentence Investigation Report (PSI).

5. **Reporter's Transcript.** The appellant requests the preparation of the **entire reporter's standard transcript** as defined in I.A.R. 25(c). The appellant also requests the preparation of the additional portions of the reporter's transcript:

- (a) Hearing held: October 18, 2012
Court Reporter: R. Patchell
Estimated pages: 100

6. **Clerk's Record.** The appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(2). The appellant requests the following documents to be included in the clerk's record, in addition to those automatically included under I.A.R. 28(b)(2):

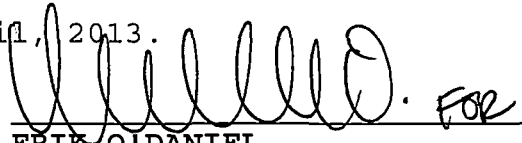
- (a) Any exhibits, including but not limited to letters or victim impact statements, addendums to the PSI or other items offered at sentencing.

7. I certify:

- (a) That a copy of this Notice of Appeal has been served on the Court Reporter, R. Patchell.
- (b) That the appellant is exempt from paying the estimated fee for the preparation of the record because the appellant is indigent. (Idaho Code §§ 31-3220, 31-3220A, I.A.R. 24(e));
- (c) That there is no appellate filing fee since this is an appeal in a criminal case (I.C. §§ 31-3220, 31-3220A, I.A.R. 23(a)(8));
- (d) Ada County will be responsible for paying for the reporter's transcript, as the client is indigent, Idaho Code §§ 31-3220, 31-3220A, I.A.R. 24(e);

(e) That service has been made upon all parties required to be served pursuant to I.A.R 20.

DATED this 12th day of April, 2013.


ERIK O'DANIEL
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on the 12th day of April, 2013, I mailed true and correct copies of the foregoing, NOTICE OF APPEAL to:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
P.O. BOX 83720
BOISE, ID 83720-0010

R. PATCHELL, HONORABLE JUDGE STICKLEN'S COURT REPORTER


Stephanie Martinez

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

200 W. Front Street, Boise Idaho 83702

STATE OF IDAHO,
Plaintiff.

vs.

Mark Christopher Hunter
911 Brook Trout Ln
Meridian, ID 83642

Defendant.

Case No: CR-MD-2011-0005903

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

BC Pretrial Conference....Monday, May 20, 2013....02:30 PM
Judge: Kevin Swain

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the court and on file in this office. I further certify that copies of this notice were served as follows:

Defendant: Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Erik J O'Daniel
200 W Front St Rm 1107
Boise ID 83702

Private Counsel: Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Prosecutor: Interdepartmental Mail ☒ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian
Clerk AM Date 5-6-13

Public Defender: Interdepartmental Mail ☒
Clerk VP Date 5-6-13

Other: _____

Mailed _____ Hand Delivered _____ Signature _____
Clerk _____ Date _____ Phone () _____

Dated: 4/30/2013

CHRISTOPHER D. RICH
Clerk of the Court

By: Amo
Deputy Clerk

Cite Pay Website: <https://www.citepayusa.com/payments> Supreme Court Repository: <https://www.idcourts.us>

ADA COUNTY MAGISTRATE MINUTES

Mark Christopher Hunter CR-MD-2011-0005903

DOB: [REDACTED]

Scheduled Event: BC Pretrial Conference Monday, May 20, 2013 02:30 PM

Judge: Kevin Swain

Clerk: *Lucky*

Interpreter: _____

Prosecuting Agency: ☐ AC ☒ BC ☐ EA ☐ GC ☐ MC

Pros: *Laurie Fortier*

PD Attorney: _____

• 1118-8004 M2 Driving Under the Influence (Second Offense) M

_____ Case Called Defendant: _____ Present ☒ Not Present _____ In Custody

_____ Advised of Rights _____ Waived Rights _____ PD Appointed _____ Waived Attorney

_____ Guilty Plea / PV Admit _____ N/G Plea _____ Advise Subsequent Penalty

_____ Bond \$ _____ ROR _____ Pay / Stay _____ Payment Agreement

☒ In Chambers _____ PT Memo _____ Written Guilty Plea _____ No Contact Order

Count
Case on Appeal
no action

Finish () Release Defendant

NO. _____
A.M. 8:00 FILED P.M. _____

JUN 18 2013

CHRISTOPHER D. RICH, Clerk
By BRADLEY J. THIES
DEPUTY

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: State of Idaho v. Mark C. Hunter, Docket No. 40950

Notice is hereby given that on Monday, June 17, 2013, I lodged a transcript of 23 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 10/18/2012

David Cromwell
Tucker & Associates

cc: kloertscher@idcourts.net
PDF format of completed files emailed to Supreme Court

By

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,
vs.

MARK C. HUNTER,

Defendant-Appellant.

Supreme Court Case No. 40950

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

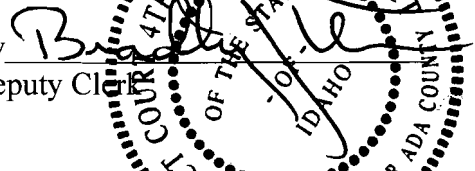
There were no exhibits offered for identification or admitted into evidence during the course of this action.

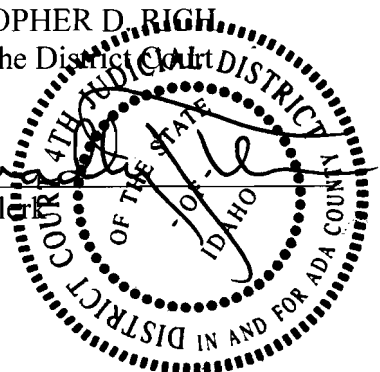
I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Transcript of Suppression Hearing Held November 7, 2011, Boise, Idaho, filed May 7, 2012.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 18th day of June, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

MARK C. HUNTER,

Defendant-Appellant.

Supreme Court Case No. 40950

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

ADA COUNTY PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

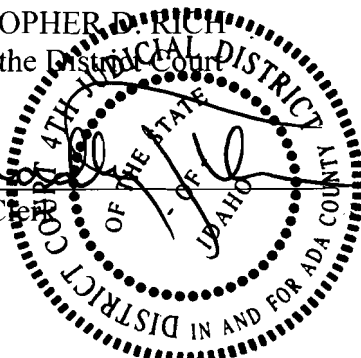
ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date of Service: JUN 18 2013

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH
Clerk of the District Court
By B. Rich
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

MARK C. HUNTER,

Defendant-Appellant.

Supreme Court Case No. 40950

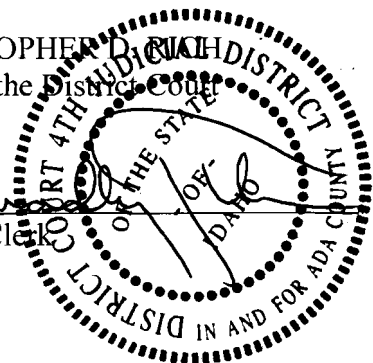
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 12th day of April, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By B. Rich
Deputy Clerk



CERTIFICATE TO RECORD

000159